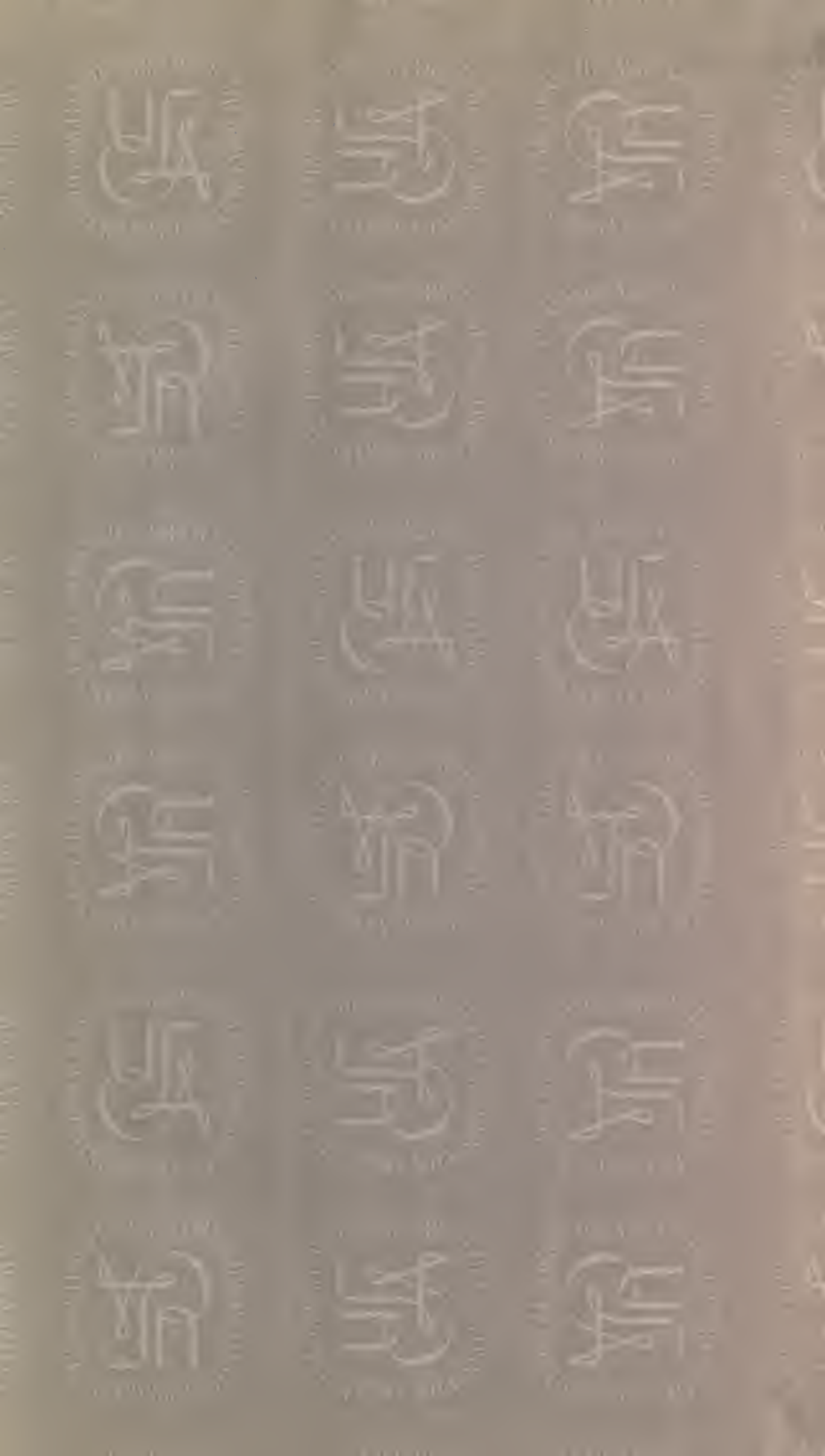

P N Stafford

INTERNATIONAL LAW.

THE CASE

OF THE

PRIVATE ARMED BRIG OF WAR

GEN. ARMSTRONG,

CONTAINING

LETTERS AND DOCUMENTS REFERRING TO THE HISTORY OF THE CLAIM; BRIEF OF FACTS, AND AUTHORITIES CITED; ARGUMENTS OF CHARLES O'CONOR, ESQ., HON. P. PHILLIPS, AND SAM C. REID, JR.; AND BRIEF OF THE U. S. SOLICITOR

BEFORE THE UNITED STATES COURT OF CLAIMS

AT WASHINGTON, D. C.

WITH

THE DECISION OF THE COURT,

AND

AN APPENDIX

CONSISTING OF

SECRETARY MONROE'S LETTER OF INSTRUCTIONS TO PRIVATE ARMED VESSELS; THE TREATY WITH PORTUGAL, AND THE AWARD OF LOUIS NAPOLEON.

REPORTED AND EDITED
BY SAM C. REID, JR.,
COUNSELLOR AT LAW.

NEW YORK:
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ALBANY:
GOULD, BANKS & CO., 475 BROADWAY.

1857.

OFFICIAL REPORT

OF

THE BATTLE OF FAYAL,

MADE BY CAPTAIN REID TO MESSRS. JENKINS AND HAVENS, THE AGENTS.

FAYAL, *4th October*, 1814.

WITH infinite regret I am constrained to say it has eventually fallen to my lot to state to you the loss and total destruction of the private armed brig General Armstrong, late under my command.

We sailed from Sandy Hook on the evening of the 9th ult., and about midnight fell in close aboard of a razee and ship-of-the-line. They pursued till next day noon, when they thought proper to give over chase. On the 11th, after a nine hours' chase, boarded the private armed schooner Perry, John Colman, six days from Philadelphia; had thrown over all his guns. On the following day, fell in with an enemy's gun brig; exchanged a few shots with, and left him. On the 24th, boarded a Spanish brig and schooner, and a Portuguese ship, all from the Havana. On the 26th following, came to in Fayal Roads, for the purpose of filling water; called on the American consul, who very politely ordered our water immediately sent off, it being our intention to proceed to sea early the next day. At 5, P.M., I went on board, the consul and some other gentlemen in company. I asked some questions concerning enemy's cruisers, and was told there had been none at these islands for several weeks; when about dusk, while we were conversing, the British brig Carnation suddenly hove in sight, close under the N.E. head of the

harbor, within gunshot when first discovered. The idea of getting under way was instantly suggested; but finding the enemy's brig had the advantage of a breeze, and but little wind with us, it was thought doubtful if we should be able to get to sea without hazarding an action. I questioned the consul to know if, in his opinion, the enemy would regard the neutrality of the port? He gave me to understand I might make myself perfectly easy, assuring me, at the same time, they would never molest us while at anchor. But no sooner did the enemy's brig understand from the pilot-boat who we were, when she immediately hauled close in, and let go her anchor within pistolshot of us. At the same moment, the Plantagenet and frigate Rota hove in sight, to whom the Carnation instantly made signal, and a constant interchange took place for some time. The result was, the Carnation proceeded to throw out all her boats, despatched one on board the commodore, and appeared otherwise to be making unusual exertions. From these circumstances I began to suspect their real intentions. The moon was near its full, which enabled us to observe them very minutely; and I now determined to haul in nearer the shore. Accordingly, after clearing for action, we got under way, and began to sweep in. The moment this was observed by the enemy's brig, she instantly cut her cable, made sail, and despatched four boats in pursuit of us. Being now about 8 P.M. as soon as we saw the boats approaching we let go our anchor, got springs on our cable, and prepared to receive them. I hailed them repeatedly as they drew near, but they felt no inclination to reply. Sure of their game, they only pulled up with the greater speed. I observed the boats were well manned, and apparently as well armed; and, as soon as they had cleverly got alongside, we opened our fire, which was as soon returned; but meeting with rather a warmer reception than they had probably been aware of, they soon cried out for quarters, and hauled off. In this skirmish, I had one man killed, and my first lieutenant wounded. The enemy's loss must have been upwards of twenty killed and wounded.

They had now repaired to their ships to prepare for a more for-

midable attack. We, in the interim, having taken the hint, prepared to haul close in to the beach, where we moored head and stern within half pistolshot of the castle. This done, we again prepared, in the best possible manner, for their second reception. About 9 P.M. we observed the enemy's brig towing in a large fleet of boats. They soon after left the brig, and took their stations in three divisions, under the covert of a small reef of rocks, within about musketshot of us. Here they continued manœuvering for some time, the brig still keeping under way to act with the boats, should we at any time attempt our escape.

The shore was lined with the inhabitants, waiting the expected attack; and from the brightness of the moon, they had a most favorable view of the scene. The governor, with most of the first people of the place, stood by and saw the whole affair.

At length, about midnight, we observed the boats in motion (our crew having laid at their quarters during the whole of this interval.) They came on in one direct line, keeping in close order, and we plainly counted twelve boats. As soon as they came within proper distance we opened our fire, which was warmly returned from the enemy's carronades and small arms. The discharge from our Long Tom rather staggered them; but soon recovering, they gave three cheers, and came on most spiritedly. In a moment they succeeded in gaining our bow and starboard quarter, and the word was *Board*. Our great guns now becoming useless, we attacked them sword in hand, together with our pikes, pistols, and musketry, from which our lads poured on them a most destructive fire. The enemy made frequent and repeated attempts to gain our decks, but were repulsed at all times, and at all points, with the greatest slaughter. About the middle of the action, I received intelligence of the death of my second lieutenant; and soon after of the third lieutenant being badly wounded. From this and other causes, I found our fire had much slackened on the forecastle; and, fearful of the event, I instantly rallied the whole of our after division, who had been bravely defending and now had succeeded in beating the boats off

the quarters. They gave a shout, rushed forward, opened a fresh fire, and soon after decided the conflict, which terminated in the total defeat of the enemy, and the loss of many of their boats : two of which, belonging to the Rota, we took possession of, literally loaded with their own dead. Seventeen only escaped from them both, who had swam to the shore. In another boat under our quarter, commanded by one of the lieutenants of the Plantagenet, all were killed saving four. This I have from the lieutenant himself, who further told me that he jumped overboard to save his own life.

The duration of this action was forty minutes. Our deck was now found in much confusion, our Long Tom dismounted, and several of our carriages broken ; many of our crew having left the vessel, and others disabled. Under these circumstances, however, we succeeded in getting Long Tom in his berth, and the decks cleared in some sort for a fresh action, should the enemy attack us again before daylight. About 3 A. M. I received a message from the American consul, requesting to see me on shore, where he informed me the governor had sent a note to Captain Lloyd, begging him to desist from further hostilities. To which Captain Lloyd sent for answer, that he was now determined to have the privateer at the risk of knocking down the whole town ; and if the governor suffered the Americans to injure the privateer in any manner, he should consider the place an enemy's port, and treat it accordingly. Finding this to be the case, I considered all hopes of saving our vessel to be at an end. I, therefore, went on board, and ordered all our wounded and dead to be taken on shore, and the crew to save their effects as fast as possible. Soon after this it became daylight, when the enemy's brig stood close in, and commenced a heavy fire on us with all her force. After several broadsides she hauled off, having received a shot in her hull, her rigging much cut, and her foretopmast wounded. She soon after came in again, and anchored close to the privateer. I then ordered the Armstrong to be scuttled, to prevent the enemy from getting her

off. She was soon after boarded by the enemy's boats, and set on fire, which soon completed her destruction.

They have destroyed a number of houses in the town, and murdered some of the inhabitants.

By what I have been able to learn from the British consul and officers of the fleet, it appears there were about 400 officers and men in the last attack by the boats, of which 120 were killed and about 130 wounded. Captain Lloyd, I am told by the British consul, is badly wounded in the leg; a jury of surgeons had been held, who gave as their opinion that amputation would be necessary to insure his life. The fleet has remained here about a week, during which they have been principally employed in burying their dead, and taking care of their wounded.

Three days after the action, they were joined by the ship Thais and brig Calypso (two sloops-of-war), who were immediately taken into requisition by Captain Lloyd, to take home the wounded men. The Calypso sailed for England, with part of the wounded, on the 2d instant, among whom was the first lieutenant of the Plantagenet. The Thais sails this evening, with the remainder. Captain Lloyd's fleet sailed to-day, supposed for the West Indies.

The loss, on our part, I am happy to say, is comparatively trifling; two killed and seven wounded. With regard to my officers, in general, I feel the greatest satisfaction in saying, they one and all fought with the most determined bravery, and to whom I feel highly indebted for their officer-like conduct during the short period we were together; their exertions and bravery deserved a better fate.

It gives me much pleasure to announce to you that our wounded are all in a fair way of recovery, through the unremitted care and attention of our worthy surgeon.

Mr. Dabney, our consul, is a gentleman possessing every feeling of humanity, and to whom the utmost gratitude is due from us for his great care of the sick and wounded, and his polite attention to my officers and myself.

Mr. Williams was a most deserving and promising officer. His country, in him, has lost one of its brightest ornaments; and his death must be sadly lamented by all who knew his worth.

Accompanied with this you will find a copy of my protest, together with copies of letters, written by Mr. Dabney to the governor of Fayal, our minister at Rio Janeiro, and our Secretary of State. These letters will develop more fully the circumstances of this unfortunate affair.

We expect to sail to-morrow, in a Portuguese brig, for Amelia Island, which takes the whole of our crew; till when, I remain, gentlemen, your very obedient, humble servant,

SAM C. REID.

I here insert, for your inspection, a list of the killed and wounded:

KILLED.

Mr. Alexander O. Williams, second lieutenant, by a musket-ball in the forehead; died instantly.

Burton Lloyd, seaman, by a musket-ball through the heart; died instantly.

WOUNDED.

Frederick A. Worth, first lieutenant, in the right side.

Robert Johnson, third lieutenant, in the left knee.

Bazilla Hammond, quarter-master, in the left arm.

John Piner, seaman, in the knee.

William Castle, seaman, in the arm.

Nicholas Scalsan, seaman, in the arm and leg.

John Harrison, seaman, in the hands and face, by the explosion of a gun.

LETTER FROM THE U. S. CONSUL AT FAYAL TO THE SECRETARY OF STATE

FAYAL, *5th October*, 1814

SIR,—I have the honor to state to you that a most outrageous violation of the neutrality of this port, in utter contempt of the laws of civilized nations, has recently been committed here by the commanders of his Britannic majesty's ships Plantagenet, Rota, and Carnation, against the American private armed brig General Armstrong, Sam. C. Reid, commander ; but I have great satisfaction in being able to add that this occurrence terminated in one of the most brilliant actions on the part of Captain Reid, his brave officers and crew, that can be found on naval record.

The American brig came to anchor in this port, in the afternoon of the 26th of September, and at sunset of the same day the above-named ships suddenly appeared in these roads ; it being nearly calm in the port, it was rather doubtful if the privateer could escape if she got under way, and, relying on the justice and good faith of the British captains, it was deemed most prudent to remain at anchor. A little after dusk, Captain Reid, seeing some suspicious movements on the part of the British, began to warp his vessel close under the guns of the castle, and, while doing so, he was, at about eight o'clock, P.M., approached by four boats from the ships, filled with armed men. After hailing them repeatedly, and warning them to keep off, he ordered his men to fire on them, and killed and wounded several men. The boats returned the fire, and killed one man, and wounded the first lieutenant of the privateer, and returned to their ships, and, as it was now light moonlight, it was plainly perceived from the brig, as well as from the shore, that a formidable attack was premeditating. Soon after midnight, twelve or more large boats, crowded with men from the ships, and armed with carronades, swivels, and blunderbusses, small arms, &c., attacked the brig ; a severe contest ensued, which lasted about forty minutes, and ended

in the total defeat and partial destruction of the boats, with a most unparalleled carnage on the part of the British. It is estimated by good judges that nearly 400 men were in the boats when the attack commenced, and no doubt exists in the minds of the numerous spectators of the scene, that more than half of them were killed or wounded; several boats were destroyed; two of them remained alongside the brig, literally loaded with their own dead. From these two boats only seventeen reached the shore alive; most of them were severely wounded. The whole of the following day the British were occupied in burying their dead; among them were two lieutenants and one midshipman of the Rota; the first lieutenant of the Plantagenet, it is said, cannot survive his wounds, and many of the seamen who reached their ships were mortally wounded, and have been dying daily. The British, mortified at this signal and unexpected defeat, endeavor to conceal the extent of the loss; they admit, however, that they lost in killed, and who have died since the engagement, upwards of 120 of the flower of their officers and men. The captain of the Rota told me he lost 70 men from his ship. Two days after this affair took place, the British sloops-of-war Thais and Calypso came into port, when Captain Lloyd immediately took them into requisition to carry home the wounded officers and seamen—they have sailed for England, one on the 2d and the other on the 4th instant; each carried 25 badly wounded. Those who were slightly wounded, to the number, as I am informed, of about 30, remained on board of their respective ships, and sailed last evening for Jamaica. Strict orders were given that sloops-of-war should take no letters whatever to England, and those orders were rigidly adhered to.

In face of the testimony of all Fayal, and a number of respectable strangers who happened to be in this place at the moment, the British commander endeavors to throw the odium of this transaction on the American captain, Reid, alleging that he sent the boats merely to reconnoitre the brig, and without any hostile intentions. The pilots of the port did inform them of the privateer

the moment they entered the port. To reconnoitre an enemy's vessel in a friendly port, at night, with four boats, carrying by the best accounts 120 men, is certainly a strange proceeding! The fact is, they expected, as the brig was warping in, that the Americans would not be prepared to receive them, and they had hopes of carrying her by a "coup de main." If anything could add to the baseness of this transaction on the part of the British commander, it is want of candor openly and boldly to avow the facts. In vain can he expect by such subterfuge to shield himself from the indignation of the world, and the merited resentment of his own government and nation for thus trampling on the sovereignty of their most ancient and faithful ally and for the wanton sacrifice of British lives.

On the part of the Americans the loss was comparatively nothing; two killed and seven slightly wounded; of the slain, we have to lament the loss of the second Lieut., Mr. Alexander O. Williams of New York, a brave and meritorious officer.

Among the wounded are Messrs. Worth and Johnston, first and third lieutenants; Capt. Reid was thus deprived, early in the action, of the services of all his lieutenants; but his cool and intrepid conduct secured him the victory.

On the morning of the 27th ult., one of the British ships placed herself near the shore, and commenced a heavy cannonade on the privateer. Finding further resistance unavailing, Capt. Reid ordered her to be abandoned, after being partially destroyed, to prevent her falling into the hands of the enemy, who soon after sent their boats and set her on fire.

At 9 o'clock in the evening (soon after the first attack), I applied to the governor, requesting his excellency to protect the privateer, either by force, or by such remonstrance to the commander of the squadron as would cause him to desist from any further attempt. The governor indignant at what had passed, but feeling himself totally unable, with the slender means he possessed, to resist such a force, took the part of remonstrating, which he did in forcible but

respectful terms. His letter to Captain Lloyd had no other effect than to produce a menacing reply, insulting in the highest degree. Nothing can exceed the indignation of the public authorities, as well as of all ranks and description of persons here, at this unprovoked enormity. Such was the rage of the British to destroy this vessel, that no regard was paid to the safety of the town ; some of the inhabitants were wounded and a number of the houses were much damaged. The strongest representations on this subject are prepared by the governor for his court.

Since this affair the commander, Lloyd, threatened to send on shore an armed force and arrest the privateer's crew, saying there were many Englishmen among them, and our poor fellows, afraid of his vengeance, have fled to the mountains several times and have been harassed extremely. At length Captain Lloyd, fearful of losing more men if he put his threats in execution, adopted this stratagem ; he addressed an official letter to the governor, stating that in the American crew were two men who deserted from his squadron in America, and as they were guilty of high treason, he required them to be found and given up. Accordingly a force was sent into the country, and the American seamen were arrested and brought to town, and as they could not designate the said pretended deserters, all the seamen here passed an examination of the British officers, but no such persons were found among them. I was requested by the governor and British consul to attend this humiliating examination, as was also Captain Reid ; but we declined to sanction by our presence any such proceedings.

Captain Reid has protested against the British commanders of the squadron for the unwarrantable destruction of his vessel in a neutral and friendly port, as also against the government of Portugal for their inability to protect him.

No doubt this government will feel themselves bound to make ample indemnification to the owners, officers, and crew of this vessel, for the great loss they have severally sustained.

I shall as early as possible transmit a statement of this transaction to our minister at Rio Janeiro for this government.

I have the honor to be, with great respect, sir, your most obedient servant,

JOHN B. DABNEY.

To the Secretary of State of U. S.
Washington.

BRIEF OF FACTS.

The claimants in this case assert the liability of the government of the United States to indemnify them for the losses sustained herein, upon the following brief of facts:

1st. That immediately after the outrage was committed by the British fleet upon the American brig, the Portuguese government acknowledged its liability to the United States; charged the violation of the neutrality of the port upon England; and demanded an apology and indemnification from that government, which was accorded. (See letter from the Marquis de Aguiar to Mr. Sumpter, and enclosures in Sen. Doc. No. 14, 1st ses. 29th Cong. p. 22 *et ante* to 12.)

2d. That every administration of this government, from Mr. Madison's down to President Taylor's, has admitted, recognized, and asserted the rights of the claimants. (See letters of instruction from the Department of State in Sen. Doc. 14, *ibid.*) That, in 1845, under the administration of Mr. Polk, the Portuguese government, for the first time, denied its liability, and refused indemnification; and the prosecution of the claim was abandoned by Mr. Upshur on the ground that "argument and importunity had been exhausted," although the claimants' rights were never once questioned. (See letter of Senor De Castro, Sen. Doc. 14, p. 48, and Mr. Upshur to Mr. Reid, and reply, *ibid.*, p. 54.) That afterwards, during Mr. Polk's administration, this claim was brought before

the Senate of the United States, by a resolution calling for the correspondence in the case, and the Committee on Foreign Relations recommended its reference back to the Department of State for further prosecution, which was ordered.—(See Mr. Atherton's report, May 19, 1846.)

3d. That, under the administration of General Taylor, the prosecution of this and other claims against Portugal was renewed by a letter of instructions from Mr. Clayton to Mr. Hopkins.—(See letter G, p. 16, in Ex. Doc. Ho. of Reps., No. 53, 1st ses., 32d Cong.) Finally, on the 8th of March, 1850, Mr. Clayton, Secretary of State, was instructed by the President to make a peremptory demand for this claim through Mr. J. B. Clay, our chargé at Lisbon, in opposition to the proposition of Portugal to refer this and other claims to arbitration.—(See letter U. p. 68, V. 69, Y. 73, in Doc. 53, *ibid.*)

4th. That on this demand being made, Portugal offered to pay all the other claims, *as a bonus*, if the United States would refer the Armstrong claim to arbitration, which proposition was again rejected, and Mr. Clay demanded his passports, and left for France. —(See letters Y, Z, AA, BB, p. 73 to 81, and BBB, 112, in Doc. 53, *ibid.*)

5th. That pending this negotiation the Portuguese government made *further admissions of its liability* by citing the acts and acknowledgments of the English government.—(See letter I, Count Tojal to Mr. Hopkins, p. 34, and letter L, to Mr. Clay, p. 51, and Mr. Clay's reply, M, p. 54, *ibid.*) That Portugal *never admitted that she had abandoned the claim made on England*, for indemnification for the destruction of the brig, up to this time.—(See letter of Mr. Hopkins, H, p. 31, *ibid.*) That Mr. Clay demanded copies of the diplomatic correspondence between Portugal and England on this subject, which was refused.—(See letter K, p. 46, *ibid.*) That, notwithstanding, England was constantly *interfering with this negotiation*, and furnishing communications and *arguments to Portugal.*— (See letters N, p. 57, and P, p. 62, *ibid.*)

That in the meantime, the Portuguese minister at Washington opened a correspondence with the Secretary of State, strenuously urging the arbitration, to which Mr. Clayton peremptorily refused, under instructions from the President, whose intention it was to lay this claim before Congress for its final action.—(See letters TT, p. 97; No. 22, p. 180, No. 25, p. 186, and No. 27, p. 191, ZZ. p. 110, VV. p. 99, U. 68, *ibid.* and private letter of Mr. Clayton, F.)

6th. That on the 9th July, 1850, General Taylor died, previous to which period all negotiations had ceased, the Portuguese government having received the *ultimatum* of the President. That on the accession of Mr. Fillmore's administration, Mr. Webster—only three days after succeeding Mr. Clayton—agreed with Mr. Figaneiro to accept the *bonus* of the payment of all the other demands, and arbitrate the Armstrong case.—(See Mr. Clayton's speeches, p. 5, 13, and 17.) Mr. Clay was informed of this acceptance, and requested to return to Lisbon to complete the arrangement; which, for the most honorable and delicate reasons, he declined.—(See letter DD, p. 83, *ibid.*) That on the *5th September*, 1851, Mr. Webster officially communicated to the Portuguese minister the President's acceptance of the terms to arbitrate this claim.—(See letter BBB, p. 112, *ibid.*)

7th. That the private agreement to arbitrate this claim was entered into without the advice, information, knowledge, or consent of the claimants, reversing the opinion of the previous Executive, and in direct violation of the plighted faith, solemnly asseverated to Portugal, that it would never consent to compromise the honor of the nation or the rights of the claimants.—(See conclusion of letter H, p. 33, *ibid.*) That on hearing of the rumor of the acceptance through the newspapers, the agent of the claimants immediately wrote to the Secretary of the State, protesting against this course, and begged to have the matter postponed until he could arrive in Washington. He was informed, however, that it was too late, that the proposition had already been accepted, and the fa-

formally announced to Portugal.—(See letter of Mr. Reid, and Mr. Webster's reply, p. 9 in the printed speeches, original marked A.) That the responsibility was hereby fully assumed without the consent of the claimants, and the act became established, perfect and complete. That the said convention was not absolutely drawn up until the 26th of February, 1851, seven months after the verbal acceptance.—(See letters FF and GG, p. 84, in House Doc. No. 53.)

8th. That this treaty or convention was submitted to the Senate, and ratified on the 10th March, 1851, in secret session, without any possible knowledge or information of the nature and circumstances under which said convention was made.—(See letter GG. p. 84, *ibid.*, and Sen. Doc. No. 7, 1st Session 33d Congress.)

That the first article of said convention declares the conditions under which said treaty was made, and that the *consideration* of the *bonus*, for which this claim was agreed to be arbitrated, *is set forth in the fourth article of said treaty*.—(See Treaty in Appendix.)

That said treaty is imperfect and defective, and was made in violation of all principles of justice, and without a strict regard to the protection of the rights of the claimants: *first, because* said treaty, under the second article, has for its only object the decision of a point of public law, which is not expressed or set forth in such a manner as to compel the finding of the arbiter to be confined to any particular *point of law* or statement of facts ; *second, because*, under said second article, it is provided that the claim *only* "in behalf of the captain, officers, and crew of said privateer should be submitted to the arbitrament," while the claim in behalf of *the owners* of said brig General Armstrong, is wholly disregarded, omitted, and unprovided for, under said convention, consequently, the claim of said owners was never submitted to arbitration ; *third, because*, under the third article of said convention, it is not stipulated that the arbiter shall *hear and decide upon the law* and the facts which shall be submitted by the claimants through their government, as well as on the part of Portugal. *Fourth, because*, by the third arti-

cle of said treaty, the evidence is confined to the *correspondence only*, at Lisbon, which has passed between *the two governments*, in reference to said claim ; and the *protocol* drawn up by Mr. Webster, in the nature of instructions as to the mode and terms of submitting the case to the arbiter, excluded all the important correspondence of 1814, at Rio de Janeiro, between the Portuguese and British Ministers ; the letter of admission from the Portuguese to the American Minister ; the letter of the British Consul ; Captain Reid's protest, and other documents contained in Sen. Doc. 14, 1st sess. of 29th Congress.—(See HH, p. 85 ; KK, p. 86 ; and LL, p. 87, Doc. 53 ; and copy of Protocol, marked No. 1.)

9th. That on the 7th July, 1851, the claimants, by their agents, filed at the Department of State a written argument ; and statement of facts, which he requested to be sent to our minister, that the claimants might be properly represented before the arbiter, but he was verbally refused, on the ground that the terms of the treaty precluded it.—(See argument submitted to the Department of State in the Memorial, p. 12.) The agent afterwards addressed two notes to the Secretary of State, urging this request, but received no answer.—(See letters B and C to Mr. Webster.) The agent then addressed himself to the President, desired to be sent to France with the papers and documents, and that he might be authorized to present the case of the claimants through Mr. Rives, the American minister at Paris, to the arbiter, which was also refused.—(See letter from Mr. Crittenden, acting Secretary of State, marked D.)

10th. That on the 9th of June, 1851, Mr. Hadduck concluded the protocol, and sent the papers to Mr. Rives at Paris.—(See letter LL, p. 87, in House Doc. No. 53 ; letter of Mr. Thomas, assistant Secretary of State, marked No. 2.) On the 1st November, 1851, the President of France accepted the office of arbiter. Subsequently, Louis Napoleon became "Prince President," and on the 29th November, 1852, one year after the case was submitted, Mr. Rives was informed that a decision had just been rendered.—(See Sen. Doc. No. 24, 2d sess. 32d Congress, p. 2.)

That on the 10th December, 1852, Mr. Rives was informed by the French Minister that the *Emperor* had deputed him to deliver the award in his name, and that said award was delivered the next day accordingly, in the name of the *Emperor of France*, contrary to the treaty stipulation, which referred the case to the *President of France*.—(See letter of Drouyn De L'Huys, p. 3, *ibid.*, and Mr. Rives to Mr. Everett, p. 1, *ibid.*)

11th. That as soon as the award of the Emperor of France was made public, the claimants, by their agent, entered a solemn protest against its acceptance by the United States; (See copy of Protest, letter No, 3.) but was informed by letter from Mr. Everett, Secretary of State, *marked E*, dated 11th February, 1853, that "the award of the arbiter in this case must be considered as decisive." This declaration was reiterated in Mr. Marcy's letter to the President, in Sen. Doc. No. 7, 1st sess. of 33d Congress.

12th. That said award does not comply with the terms of the treaty creating the arbitration, because it does not decide any point of public law involved in the case.—(See letters of Mr. Hopkins, H, pp. 26 and 27. Count Tojal, I, p. 37. Mr. Clay, M, p. 56 and Q, p. 65, in House Doc. No. 53.) That the statements upon which said award is founded are perverted and in violent contradiction of the facts and evidence. That said award was evidently drawn up by the Portuguese official, as it is in the language of the arguments used, and is in the form of the executive decrees of Portugal.—(See p. 125, *ibid.*)

That it shows on its face that the *information* obtained in regard to the facts were received from the Portuguese representative, and that he was evidently permitted a hearing, while the claimants were in no manner represented.

13th. That the reasons assigned in said award are totally at variance with and in contradiction of themselves: 1st *because* it charges the violation of the neutrality equally on the part of both the belligerents; 2d, *because* it assigns for non-liability the weakness and disability of the island of Fayal, to afford protection,

while it alleges that Captain Reid did not apply from the beginning for intervention, but had recourse to arms, "*which released the sovereign of the obligation in which he was to afford protection by any other means than that of pacific intervention.*"—(See award in Appendix.)

That said award is disrespectful and insulting to this government, because it advances among other reasons, an act in defence of the Portuguese governor, which was considered reprehensible at the time, and in conjunction with the committal of an act, with the permission of said governor, by the British officers against the American sailors, which had been justly rebuked by Mr. Clay as insulting.—(See letter K., pp. 47 and 48, *ibid.*)

It is under these circumstances the claimants ask to be indemnified by their government for the losses sustained and claimed in their petition.

BRIEF OF AUTHORITIES CITED ON THE PART OF THE CLAIMANTS.

1. Of Jurisprudence as enlarged by legislative authority, with increased power of establishing justice. Ordinary courts of law are not created to declare or enforce justice in the abstract, or justice in general. See note A to De Bode *vs.* Regina, 13 Queen's Bench Rep., 387. Jackson *vs.* Bartholomew, 20 Johnson's Rep., 28. Story's Eq. Jur., §§ 8, 9.

2. Whatever *leads* to hostility in neutral territory, as well as direct hostility between belligerents, is forbidden by the law of nations. Wildman's International Law, 2 vol., 148. Case of *The Twee Gebroeders*, 3 Rob. Rep., 164. *The Ann*, 3d Wheaton's Rep., 435. *The Mariana Flora*, 11 Wheaton, p. 1.

3. The loss arising out of the violation of neutrality, must be made good by the neutral government. Case of *The Ann*, ibid. Kent's Com., vol. i. p. 122. Bynkershoeck, b. 1, c. 8. De Jure

Maritimo, b. 1, c. 1. p. 13. Flander's Maritime Law, p. 45. Case of the French ship *Grangé*, captured by the English in the Chesapeake Bay. Jefferson's letter to Penant, 3 vol. Jeff. works, 232. Opinions of Attorney General, vol. i., p. 33. Report of the Committee on Foreign Relations of the U. S. Sen., Jan., 1817, in case of *The Armstrong*. *Twee Gebroeders*, 3 Rob. Rep., 162. 1 Wheaton, 405 ; 4 Wheaton, 52 ; *Ibid.*, 298.

4. The indemnity due must be obtained by the neutral at his own expense, and at all hazards. Duponceau's Law of War, p. 60.

5. The admissions of Portugal's liability to the United States, and her demand against England. See Letters of the Marquis de Aguiar to Mr. Sumpter, the American Minister at Rio, and to the British Minister, Lord Strangford, 22 Dec., 1814.

6. The liability of Portugal in this case has been uniformly asserted by our government. (See instructions.) Monroe to Sumter, 3d January, 1815 ; Adams to de Serra, 14th May, 1818 ; Dickens to Kavanagh, 20th May, 1835 ; Forsyth to Kavanagh, 22d October, 1835 ; Webster to Barrow, 15th January, 1842 ; Webster to Barrow, 18th August, 1842 ; Clayton to Hopkins, 20th April, 1849 ; Clayton to Clay, 8th March, 1850.

7. Liability of the government for its mis-conduct and neglect in the prosecution of the claim. Sheels *vs.* Blackburne, 1 Henry Blackstone, 158 ; Fellows *vs.* Gordon, 8 B. Monro, 415.

8. The government is bound to protect its citizen, and obtain redress when spoliated by a foreign government, or become itself responsible. Wendell's Blackstone, pp. 370, 371, and notes ; Baron de Bode's case, 16 Eng. L. and Eq. Rep., p. 23 ; Farnham *vs.* Brooks, 9 Pickering's Rep., 239 : See Denio, Ch. J., 3 Kernan's N. Y., Rep.. 149. (See Decision of British Commissioners in the case of the Hudson Bay Company *vs.* the United States, reported in adjustment of claims under the convention of 8th February, 1853, with Great Britain, p. 165, in President's Message of Aug. 11, 1856.)

9. In accepting a proposition to arbitrate a case, the several

parts of the offer cannot be separated, it must be accepted or rejected *in toto*. 2d Sandford's Chancery Rep., 244.

10. In submitting the case to arbitration, without the assent of the claimants, and refusing them the right to be heard in any manner by the arbitrator, either as to the law of the case, or by the production of evidence as to the facts. See Elmendorf *vs.* Harris, 23 Wend. 633 ; Jordan *vs.* Hyatt, 3 Barb., s. c., 275 ; Oswald *vs.* Gray, 29 Eng. Law and Eq., 88 ; Emory *vs.* Owings, 7 Gill., 488; Kyd on Awards, 95 ; Falconer *vs.* Montgomery, 4th Dallas's Rep., 233 ; Sharp *vs.* Bickerdike, 3d Dow's Parliamentary Rep., 102.

11th. In accepting the award as final and conclusive, when it should have been rejected as not responding to the terms of the submission. Vattel's Law of Nations, p. 277 ; Wildman, vol. 1 p. 186 ; Steers *vs.* Lashel, 1 Esp. N. P. C., p. 167 ; Oxenhan *vs.* Lemon, 2 Dow. & R., 461 ; Vattel, book 11, ch. 18, § 239.

REPORT

OF THE

ARGUMENTS.

ARGUMENT OF SAM C. REID, JUN., ESQ.

IN THE CASE OF THE CLAIMANTS OF THE PRIVATE ARMED BRIG GENERAL ARMSTRONG. BEFORE THE U. S. COURT OF CLAIMS, SITTING IN THE NATIONAL CAPITOL.

WASHINGTON, *Saturday, November 17th*, 1855.

THIS cause came on to-day by consent. Present their Honors JOHN J. GILCHRIST, Chief-Justice; ISAAC BLACKFORD, and GEORGE P. SCARBURGH, Associate Justices.

The Claimants were represented by CHARLES O'CONOR, Esq., and SAM C. REID, Junior, of New York; Hon. P. PHILLIPS, of Alabama, and HON. CHARLES NAYLOR, of Pennsylvania.

HON. MONTGOMERY BLAIR, U. S. Solicitor, appeared for the Government.

MR. REID, on opening the case, addressed the Court as follows:

May it please the honorable Court—

I present myself before your honors to-day to vindicate a principle of national faith, to substantiate the oath of American honor, and to verify a great national and historical fact, denied both by

Portugal and England, and solemnly declared to be false by the public decree of France.

In doing so, I shall expose the most remarkable diplomatic negotiation to be found on record; which reflected as great discredit by the course pursued, as the gallant and brave defence made by the vessel shed glory and splendor upon the country.

Sirs, this is a case in which not only the claimants are interested: it is a cause in which every patriot, every American, has a deep, absorbing interest, so far as the honor of his own country is concerned.

I shall ask the great indulgence of this Court, as I proceed to lay before it the evidence to establish the facts alleged, and I beg your honors will extend to me your liberal forbearance and attention.*

The petition charges that, on the 26th and 27th of September, A.D. 1814, the United States private armed brig General Armstrong commanded by Captain Sam C. Reid, belonging to the port of New York, was destroyed by a large British fleet in the neutral port of Fayal, in the Dominions of Portugal, in violation of the laws of nations. That the Government of Portugal, immediately after the transaction, admitted her liability to this Government, and called upon England for an apology and indemnification, which was unhesitatingly accorded. That the United States Government, from the inception of this claim to the present day, has always acknowledged the rights of the claimants as legal and just. That under the administration of General Taylor, a fleet was sent to Portugal and a peremptory demand made for this claim. That afterwards the Government of the United States made a treaty with Portugal, whereby she compromised the rights of the claimants, and for a *bonus* agreed to refer the "Armstrong Claim" to arbitration. That Louis Napoleon, the Umpire, decided adversely to the claimants, and contrary to the law and evidence, and the facts in the case, and in violation of his oath as President of the Republic of France, the decision having been rendered by the "Emperor of France." That the treaty and agreement made with Portugal to

* See Appendix for documents read in evidence.

arbitrate this claim was made without the knowledge, consent, or advice of the claimants or their agent. That the Government of the United States never protested against said award as being illegal, unjust, and contrary to the articles of the treaty in this case made with Portugal, although she was fully aware of the same.

That the Government of the United States, in making said treaty with Portugal, without the knowledge, advice, or consent of the claimants, assumed the responsibility, and undertook, and promised to pay the claimants their justly-recognized demands against Portugal, to wit: the sum of one hundred and thirty-one thousand and six hundred dollars, being the amount recognized by this Government and demanded of Portugal.

That the facts herein contained all appear in the following documents, which are prayed to be filed herewith, and made a part of this petition, to wit:

No. 1. "The memorial to Congress of Sam C. Reid, jr."—(Sen. Mis. Doc. No. 14, 1st sess. 33d Congress.)

No. 2. "Message of the President of the United States," containing the correspondence, &c., from 1814 to 1844, in Sen. Doc. 14, 1st sess. 29 Congress.

No. 3. "Convention and treaty with Portugal."

No. 4. "Message from the President of the United States," containing correspondence, &c., between this Government and Portugal, in Ex. Doc. No. 53, Ho. of Rep. 1st sess. 32d Congress.

No. 5. "Correspondence and award of Louis Napoleon," in Ex. Doc. No. 24, Senate 2d sess. 32 Congress.

No. 6. "Reports of Committees in Senate and House of Representatives."—(1st sess. 33d Congress, No. 157 Senate, and 139 House of Representatives."

No. 7. Debate on the bill in the Senate, in speeches of Hon. Messrs. Clayton, Brown, Bayard, Seward, Weller, Cass, and Houston.

Your petitioner further represents that the said claim was pre-

sented to the Congress of the United States on the 19th day of January, 1854, and referred to the Committee on Foreign Relations in the Senate. Said Committee, on the 10th day of March, 1854, reported in favor of said claimants; which said report and accompanying bill have been made parts of this petition. On the 26th day of January, 1855, the bill was ordered to be engrossed for a third reading, by a vote in the Senate of ayes 22, nays 17, which vote was afterwards reconsidered on the 16th February, 1855, and the bill ordered to lie upon the table by a vote of ayes 24, nays 23.

Your petitioner further represents that the said claim, having also been presented to the House of Representatives, the Committee on Foreign affairs, to whom it was referred, reported in favor of the claimants on the 29th of May, 1854, which said report and accompanying bill have been made parts of this petition. That said bill for the relief of the claimants failed to be acted upon by the House of Representatives for the want of time, and was, by a resolution of that body, transferred to this honorable court.

Therefore your petitioner prays that, in consideration of the premises, after investigation and argument herein, a bill be reported by this honorable court for the relief of the owners, officers, and crew of the United States private armed brig General Armstrong, the claimants in this case, to the Congress of the United States, appropriating the sum of one hundred and thirty-one thousand six hundred dollars, to be paid to the said claimants, or to their legally authorized representatives, out of the treasury of the United States.

And, in duty bound, your petitioner will ever pray, &c.,

SAM C. REID, JR.

Agent and Attorney for Claimants.

DISTRICT OF COLUMBIA,
City and County of Washington.

Personally appeared before me, the undersigned, Sam C. Reid, Jr., one of the claimants in the above case, who, being sworn, made

oath that the matters contained in the annexed printed statement are true, to the best of his knowledge and belief.

SAM C. REID, JR.

Sworn and subscribed before me this 13th day of July, A.D. 1855.

W. P. WILLIAMS, *Notary Public.*

MR. REID here proceeded to read to the Court the following documents as evidence in support of this case. [See Appendix.]

Monday November 18th, 1855.

MR. REID, on offering in evidence the letter of Mr. Chas. W. Dabney, U. S. Consul at Fayal, to Mr. Wm. L. Marcy, Secretary of State,

MR. BLAIR objected, and said—I do not know what are the contents of the letter the gentleman proposes to read or what he intends to prove by it. The gentleman has already read several papers to the Court not included in, or made part of his petition, and I shall insist on his confining himself solely to the documents in the petition.

MR. PHILLIPS rose to explain, and said—May it please your Honors, the letter in question is of a remarkable character, and goes to establish the fact, beyond all dispute or cavil, that the British were the first to violate the neutrality of the port of Fayal. The existence of this letter was discovered but a few days ago, by Mr. Reid, from an incidental conversation with a gentleman, late an officer of our navy, who visited Fayal about a year ago, and who had conversed with Mr. Dabney on the subject. I, therefore, move that the petition be amended, and that this letter and the other documents, not alluded to in the petition, be made a part thereof.

MR. BLAIR opposed the motion.

Mr. Reid. If the Court please, the course pursued by the learned solicitor, on this occasion, is very remarkable. He has sat by, listening to the reading of documents and letters used against the claimants in the debate on this claim in the Senate (not referred to in the petition) and took no objection, because the evidence was supposed to run in favor of the government. He has heard me read private letters produced against the claimants by the Department of State, charging them with having acquiesced to this arbitration, and no objection was taken whatever. But when I come to read a piece of newly-discovered evidence—a public letter to this government, tending to establish the rights of the claimants, the learned solicitor objects!

Sirs, I have concealed nothing in this case. I have put every particle of evidence before this Court, for and against the claimants. The learned solicitor asks what this letter contains? Sirs, it contains the truth—the very essence of this case. It contains the statement of a distinguished gentleman, widely known on both sides of the Atlantic, for his nobleness of character, for his honor and probity. A gentleman, whose princely position and wealth puts him beyond the reach of suspicion or temptation! I appeal to the magnanimity of the solicitor, and ask him whether his duty, as a government officer, prompts him to make these technical objections in a case of this character, or whether it should not urge him to adopt a nobler course—that of the highest equity? I hope the motion of my learned colleague will prevail.

By the Court [after consultation]. Leave to amend the petition will be granted, and the documents considered as made a part thereof.

The letters marked A, B, C, D, E, and F, and documents marked [1, 2, 3, and 4] were then made part of the petition.

Mr. Reid having read Mr. Dabney's letter, and other documents, here rested the case, and it being near three o'clock, the Court adjourned.

Tuesday, November 20th.

The Court met pursuant to adjournment. The evidence having been closed,

Mr. Reid, in summing up, spoke as follows :

May it please the honorable Court—

I come now to the argument of this cause, upon the evidence which has been laid before it.

I come to the argument of this cause with deep and powerful feelings of a sense of wrong and injury, which have been heaped upon the claimants for nearly half a century ! I will not conceal that I come to it exultingly, and that I have looked forward to this hour with an intense and painful interest.

I shall permit no *scruples of policy* to guide my course, and I shall speak in plain language as being the best adapted to the vindication of truth, of honor, and of justice, which have so long been made subservient to the miserable falsehoods, prevarications, and weaknesses of unjust men !

Assuming the doctrine laid down by the most distinguished commentators and publicists on international law, be true, that the violation of the port or territory of any neutral power by a belligerent, and the capture of property, public or private, under the protection of the neutral flag, imposes on the neutral power a liability to indemnify the owner for all losses sustained, I shall proceed to fix the liability, in this case, first, upon Portugal.

We charge that the brig General Armstrong was attacked and destroyed by the British fleet, in violation of the laws of neutrality, and of the protection which that vessel sought in the neutral port of Fayal. To support this fact, we have the sworn protest of Captain Reid, and nine of his officers ; the letters of John B. and Charles W. Dabney, U. S. consuls at Fayal ; the statement of Governor Ribeiro ; and the letters of the Marquis de Aguiar, the

Portuguese Minister of State, to Mr. Sumpter and Lord Strangford, the American and British ambassadors at Rio Janeiro.

It must be remembered that the statement of Gov. Ribeiro to his government was his voluntary act, founded upon official reports made to him by the officers of the Castle, and what he himself witnessed. In this statement, the violation of the neutrality of the port of Fayal is expressly charged against the commander of the British fleet. In describing the affair, the Governor says :

"We are now, for the first time, *made witnesses* to a horrible and bloody combat, occasioned by the madness, pride, and haughtiness of an insolent British officer, who would not respect the neutrality maintained by Portugal, in the existing contest between his Britannic Majesty and the United States of America."

The Marquis de Aguiar, in his letter to Mr. Sumpter, says :

"Nor can his royal highness avoid viewing this affair, in the light it is represented, as attacking his sovereignty and independence, by the manifest violation of his territory in the infringement of its neutrality, which ought to have been observed by the two belligerent powers. Not a moment's delay ensued in causing to be addressed to the British minister at this court the note which is confidentially communicated by a copy to your lordship, at the same time that he directed his minister in London to make the reclamation so serious an offence requires."

In the letter of the marquis to Lord Strangford, the language is unequivocal. He says :

"His excellency will likewise observe the *base attempt* of the British commander, at the time he commenced the unprovoked attack on the American privateer, to attribute those violent measures to the breaking of the neutrality on the part of the Americans in the first instance, by repelling the British armed barges that were sent for the purpose of reconnoitering that vessel, advocating, with the *most manifest duplicity*, that they were consequently the aggressors ; but what appears still more surprising, is the arrogance with which the British commander threatened to consider the territory

of his royal highness as enemies, should the governor adopt any measures to prevent them from taking possession of the American privateer, which they subsequently plundered and set on fire!

"His royal highness, at the same time that he has directed his minister at the court of London to make the strongest representations before the prince regent of the United Kingdom of Great Britain, and *require satisfaction and indemnification*, not only for his subjects, *but for the American privateer*, whose security was guaranteed by the safeguard of a neutral port, orders it to be signified to his excellency, Lord Strangford, that he may inform his government of the unfavorable impression the conduct of that British commander had caused in the mind of his royal highness," &c.

Here, then, is the open avowal and admission, on the part of Portugal, of her responsibility to the United States; and a demand made by the prince regent of Portugal, of his own free will and accord, for satisfaction and indemnification from England, before he was ever called on by this government to make indemnity.

In 1814, in compliance with the demand made by Portugal, Lord Bathurst instructs Mr. Canning, the British ambassador at Lisbon, to make a verbal apology to the prince regent.

In 1815, Mr. Monroe instructs Mr. Sumpter to call the attention of the Portuguese government to this case, "and to state the claim which the injured party has to immediate indemnification." Mr. Sumpter replies, that a demand for satisfaction *had already* been made from the British government.

In 1817, Lord Castlereigh, in obedience to the demand of Portugal, sends £319 to indemnify the subjects of that government. Now, why the indemnity demanded for the loss of the Armstrong was not sent, or the grounds of England's refusal stated, we do not know, for we never have had the benefit of any of the correspondence between Portugal and England. But it is not material at this point to make the inquiry. It is sufficient that the fact of England's apology and indemnification to Portugal stands patent and incontrovertible With what assurance, then, can England attempt

to charge on this government the very offence for which she had made reparation and apologized for thirty years ago?

In 1818, Mr. J. Q. Adams reiterates the demand against Portugal, in his letter to the Chevalier de Serra, who is informed that this claim has been admitted by the acknowledgments of the officers of his own government. At *that time*, both Portugal and England had before them the counter-statement of commander Lloyd, and the affidavit of Lieutenant Fausset (the latter made 27th September, 1814), and neither government charged Captain Reid with violating the neutrality of the port of Fayal.

Why did not Portugal *then* inform the United States that England had refused to make indemnity for this vessel, and "*at that time*," in the language of Count Tojal, "every motive had ended for expecting the British government to accede to the claim of his majesty's government for indemnification of the loss of said privateer?"

Why was not Lord Strangford immediately instructed by his government to reply to the withering charges made against commander Lloyd, whose conduct had been stigmatized in such unmeasured terms? Why was not Portugal made to retract the language and apologize, instead of the apology and indemnity made by England? and why was not a demand for an apology and indemnification presented against this government for the outrage committed? Because the damning guilt of Commander Lloyd had been too strongly established, and he, as well as Governor Ribeiro, had been reprimanded by their respective governments.

Look at the falsehood and villainy of this *Iago* Lloyd, through whom England has since taught Portugal that the honor of her *Desdemona* was false! What does he say in his letter to the Governor of Fayal, written about two hours after the first attack:

"Sir—Permit me to inform you that *one* of the boats of his Britannic majesty's ship under my command, was, *without the slightest provocation*, fired on by the American schooner General Armstrong, in consequence of which two men were killed and seven were

wounded, and that the neutrality of the port, *which I had determined to respect*, has been thereby violated. In consequence of this outrage, I am determined to take possession of that vessel, and hope *that you will order your forts to protect the force employed for that purpose.*

"With due respect, I remain, sir, your obedient servant,

"THE COMMANDER

"*Of his Britannic Majesty's Forces.*"

I challenge the production of any epistle of equal brevity, containing so many unqualified falsehoods, and so much arrogant impudence. Why, sirs, he knew every word of it was false at the time he penned it, and his innate consciousness of the fact made him ashamed to sign his name to it! I will now read Mr. Charles W. Dabney's letter, which has been sleeping for over two years in the Department of State, and which burst upon us like a gleam of sunlight on a dark gloomy tower, with all the effulgence and brilliancy of living truth:

"[No. 169.] CONSULATE OF THE U. S. FOR THE AZORES.

"*Fayal, May* 21, 1853.

"Sir—The award of his majesty Napoleon III., in the case of the General Armstrong, having just met my eye, I feel impelled, by a regard for our national honor, as well as justice to the actors in that *unparalleled* affair, to disavow, on their part, the *slightest* infringement of the neutrality of this port. The pecuniary amount is of *no* consequence to us; but I cannot allow the brilliancy of that action to be tarnished, or the slightest stain to rest on our national escutcheon. When I heard that his majesty was to be the arbitrator, I felt assured that the case would be thoroughly investigated, and that there would not be *any doubt* as to the result; and I confess that I was sadly disappointed to find that, from some cause or other, the case had not been rightly understood by his majesty.

"In the summer of 1814, the British sloop-of-war 'Thais' and

brig 'Calypso' were cruizing on this station. Their commanders were prudent men. When the brig-of-war 'Carnation' hove in sight it was supposed to be the 'Calypso,' and no apprehensions were entertained, as we felt assured that the commander would not attempt to violate the neutrality of the port. But when we were informed that a frigate and a larger vessel were in company, we concluded that it must be the razee Plantaganet, frigate Rota, and brig Carnation, under the command of Mad Lloyd * (the same that made the senseless attack on Crany Island), who had been here *three weeks before*, and had *boasted* that he had boats built expressly for cutting out American privateers, and that he would destroy them wherever he found them.

"Knowing what we had to expect, I (being then in my twenty-first year) was sent by my father (consul of the United States) to recommend Captain Reid to slip his cable and warp his vessel close in under the guns of the castle. While I was on board, the Carnation anchored within pistol-shot of the Armstrong, the frigate about half-a-mile, and the razee about a mile distant, yet under sail, it being calm, and boats were passing between the English vessels. Captain Reid immediately gave orders to carry into effect the advice that I had communicated to him, and I came on shore; just as I was landing (ten minutes after I had left the Armstrong), I heard the report of musketry; and soon after, a Captain Smith, who had gone on board to see Captain Reid, came on shore with a message from the latter, informing us that, while in the act of warping in, he had been approached by four boats, containing, by estimate, one hundred and twenty men; that they were warned repeatedly not to approach, or that he would fire into them; which, instead of heeding, only seemed to stimulate their exertions; and, as there could be no mistake of their intention to take them by surprise, no attention being paid to the warning, he had ordered his men to fire, which was *immediately returned* from the boats, killing one man and wounding

* A distinction bestowed upon him by his own countrymen.

the first-lieutenant; but, having found their reception too warm, they sued for quarter, which was immediately granted (they were then nearly alongside of the Armstrong). Captain Smith was deputed by Captain Reid to request my father to take the necessary steps for his protection, and I was sent in quest of the governor, whom I found at Judge Arriaga's, a mile from town. I was commissioned to request him to remonstrate with Captain Lloyd (the force under his command being wholly inadequate to cope with that of the British squadron) and to allow us to send thirty-two American seamen that we had here to assist in defending the Armstrong, should she be again attacked. The latter request the governor said he could not grant, as it would be an infringement of the neutrality on his part, but he accompanied me forthwith to town, and *no time was lost* in dispatching one of his aids with an official remonstrance. Captain Lloyd returned a verbal answer, indicative of his intention, and three hours after the grand attack was made on the Armstrong, then within forty yards of the Castle.

"These simple *facts* require no comment, as they admit of *no doubt*. If there could be any doubt, the character of the commander is a circumstance of the greatest importance in forming a correct opinion of the case.

"I send a plan of the harbor, showing the relative position of the Armstrong during the first and second engagements.

"I trust that my motive in addressing you on this occasion will be appreciated, and, with the highest consideration and respect, have the honor to be, sir,

"Your most obedient servant,

"CHAS. W. DABNEY.

"Hon. W. L. Marcy,

"Secretary of State, U. S.

"I am conversant with the French language, and, if necessary, would willingly go to Paris to afford any explanation that may be required.

"DABNEY.

"I can prove that the British vice-consul, who was then residing on the opposite shore of Pico, sent a letter on board the commodore's vessel two hours before they anchored; consequently there was no necessity for 'reconnoitering' with four boats full of armed men."

"*United States of America, Department of State:*

"To all whom these presents shall come, greeting:

"I certify that the paper hereunto annexed is a true copy, transcribed from and carefully collated with the original paper on file in this department.

"In testimony whereof, I, William L. Marcy, Secretary of State of the United States, have hereunto subscribed my name, and caused the seal of the Department of State to be affixed.

"Done at the city of Washington, this first day of November, A. D. 1855, and of the independence of the United States of America the 80th.

"W. L. MARCY."

None but a true patriot—none but a chivalrous, high-toned man of honor, could have written such a letter. And what does this glorious son of a noble sire say? He tells this government "*the pecuniary amount is of no consequence to us,*" but he "*cannot allow the brilliancy of that action to be tarnished, or the slightest stain to rest on our national escutcheon!*" It is upon this principle, sirs, that I have prosecuted this claim. It is the national and individual point of honor that I stand here to-day to vindicate, and I am deeply indebted to Mr. Chas. W. Dabney for his assistance in enabling me to sustain it.

Mr. Dabney states that, while he was on board the brig General Armstrong, the Carnation anchored within pistol-shot of the American brig, and at *that time*, it being calm, *boats were passing between the English vessels.* This, sirs, was a part of the *suspicious movements* which Mr. Dabney's father speaks of, and which induced that

noble gentleman, the late Hon. John B. Dabney, to send his son aboard Captain Reid's brig, to advise him to warp his vessel in under the guns of the Castle. We see that Captain Reid took this advice, and commenced warping in his vessel, and that young Dabney had hardly landed ashore from his boat when the English attacked the Armstrong, and the report of musketry was heard. The very position of the British vessels shows the unmistakable intention of the English at the time. [Mr. Reid here demonstrated on the map of the harbor of Da Horta, sent by Mr. Dabney, the position of the Armstrong during the three several attacks, and the position of the English ships and boats.] The evidence is indisputable that Captain Reid took all prudent measures in his power to avoid a collision, and to prevent a violation of the laws of neutrality. No provocation, at that time, could have induced Captain Reid to fire a gun, to jeopardize his safety, except in actual self-defence and self-preservation. The very assertion on the part of the English that Captain Reid commenced the attack against so overpowering a force, is despicable and degrading. None but a madman would have attempted it, and that madman, on this occasion, seems to have been Commander Lloyd, whose own countrymen called him mad. And the governor of Fayal attributes this attack to his madness, for he says it was "*occasioned by the madness, pride, and haughtiness of an insolent British officer,*" and that all Fayal *witnessed* this act of his madness!

But if there ever was any doubt on this question before, Mr. Dabney has dispelled it. He tells you that Mad Lloyd had been at Fayal, "*three weeks before*" this affair, "*and boasted that he had boats built expressly for cutting out American privateers, and that he would destroy them wherever he found them!*" For three weeks, then, Commander Lloyd had harbored this *confused* design, which his plain-faced *knavery* afterwards put into execution! I will call your Honors' attention to the particular fact that the Governor of Fayal, in answer to the note of "the commander of his Britannic Majesty's forces," says, "*I must, however, assure you, sir, that from the accounts*

which I have received, it is certain that the British boats were the first to attack the American schooner." Commander Lloyd never replied to this note, from the same guilty consciousness that prevented him from signing the first; and this first paragon of a note was his last, and the only document of his which graces the history of this affair. Why did he not support this letter, then, with a protest, signed by all his officers, as the American captain did, instead of the weak and falsified affidavit of his tool *Roderigo*—this perjured Lieutenant Fausset? The answer is found in the apology of Lord Bathurst—no such charge could be made! Not a syllable is uttered against the United States, and Portugal, convicted by the open declarations and recorded testimony of Governor Ribeiro, permits a period of sixteen years to elapse in silence.

In 1835, this claim is renewed against Portugal by Gen. Jackson, in the letter of Mr. Dickens to Mr. Kavanagh. At that date, she did not pretend to deny her responsibility on the grounds afterwards assumed. In 1836, Mr. Forsyth is informed by Mr. Kavanagh [p. 30, Doc. 14], that the written and verbal declarations of the Duke de Pamella had induced a belief that our claims against Portugal would have been adjusted many months ago. The Duke de Pamella had at that time [as is admitted in the letter of Count Tojal to Mr. Clay, on p. 77, Doc. 53], renewed the demand for this claim against the British government. In 1837, Mr. Kavanagh informs Mr. Forsyth [p. 33, Doc. 14], that Portugal considers this claim inadmissible, because the force at Fayal was altogether incompetent to protect the privateer against the assailants, and mentions as an *off-set* a large amount of property destroyed by our vessels sailing under the flag of Artigas. The plea here set up of the incompetency of the force at Fayal to protect the General Armstrong, was one of the very grounds complained of by Mr. Sumpter, among others, in his letter to the Marquis de Aguiar [on p. 10, Doc. 14], in which he said he did not wish "to enhance the censures which may be due for so utter a destitution and incapacity of self-defence as have been alleged to exist at Fayal." As for the

plea of compensation, or set-off, I need not tell your honors that it is the admitting of one claim to counterbalance another. So, even up to 1837, Portugal directly admitted her liability to the claimants.

Now, if your honors please, I shall show that this claim was prosecuted from the year 1818, the administration of Mr. Monroe, down to the year 1844, the administration of Mr. Polk, a period of twenty-six years, without a knowledge, on the part of our government, of the previous admissions of Portugal, or the existence of the correspondence of 1814, which took place at Rio de Janeiro, between the Marquis de Aguiar, Lord Strangford, and Mr. Sumpter. I shall show, also, that Mr. Kavanagh, our chargé at Lisbon, made continual inquiry of our government for this very correspondence, from 1836, for over two years. And that, had this correspondence at that time been produced, Portugal never could have set up the defence which she afterwards did, charging that the Americans first violated the neutrality of her port. And I shall show, hereafter, that this very correspondence was quietly sleeping, like our friend Dabney's letter, for this whole period, on the shelves of the archives of the Department of State of the United States!

In Mr. Kavanagh's letter to Mr. Forsyth, dated January, 1836 [on p. 29, Doc. 14], he says: "It appears that representations on the subject were made, in 1814, to Mr. Sumpter, then Minister of the United States near the Court of Portugal, at Rio de Janeiro, and there is no record in the archives of this legation to show the result thereof."

In his letter of May, 1837 [p. 34, Doc. 14], he says: "I am informed that, in 1814 or 1815, General Sumpter, our minister at the Portuguese Court, while it was established at Rio de Janeiro, made representations of the case, and that a correspondence thereon ensued between the Portuguese government and that of Great Britain, but I have no knowledge of the result, and there is no record of the transaction in this legation."

In his letter of September, 1837 [same page], he says: "I have

been lately informed, by a gentleman, that a correspondence was had with the British minister, in relation to the destruction of the General Armstrong, but he was unable to say how it resulted. I have already stated that there are not in this legation any traces of the correspondence between the ministers of the United States (my predecessors) and the government of Portugal, until the arrival of General Dearborn, in 1822. All the archives were probably taken to Brazil, when our first mission was established there, after the emigration of the Portuguese Court to Rio de Janeiro, in 1807."

Again, in April, 1838 [p. 36, Doc. 14], Mr. Kavanagh writes to Mr. Forsyth: "I have, as yet, no information of what was done by General Sumpter, our minister at Rio de Janeiro, in 1814 or 1815, who presented the case to the consideration of the Portuguese government, then established there."

Now it is evident that Mr. Kavanagh failed to recover this claim, simply because he was not furnished with the correspondence had at Rio de Janeiro, and which was all this time lying on the shelves of the State Department! Well, sirs, as late as November, 1842, I addressed a note to the State Department [p. 43, Doc. 14], calling its attention to this correspondence, and asking for copies to be made out, but was informed that the Department could not employ clerks for such purposes. [See letter, Mr. Webster to Mr. Reid, p. 45, Doc. 14.]

In 1842, under Mr. Tyler's administration, this claim was again urged against Portugal by Mr. Webster, in instructions to Mr. Barrow. [See p. 40 and 42, Doc. 14.] Mr. Barrow addresses a note to Señor de Castro, and is informed by that worthy minister that he wishes "*to gather some further particulars to elucidate this business; and to that end, he will repeat the necessary orders by the next packet!*" [p. 47, Doc. 14.] That he would write to England again, for further particulars to elucidate this business!

I now come to an important part of the history of this case. I think I can show conclusively that, at this juncture, Portugal had determined to make a master-stroke of diplomacy. She knew that

for twenty-six years this government had never once alluded to the correspondence had at Rio. She knew that Mr. Kavanagh had made inquiry for it at Lisbon, in vain. She knew that her safety depended upon the concealment of this correspondence. She knew that if this correspondence, containing the evidence of her admissions of liability to this government, was either lost or destroyed, we could not make out our case against her! She believed then, that we had no record of De Aguiar's letters, or that of Governor Ribeiro! We had, at this time, *no evidence* that England had ever apologized or paid indemnity to Portugal. This, then, was the reason why she wished to gather further particulars to elucidate this business. She wished to consult England to know if it would be safe to deny her liability, upon the belief that we had no evidence against her; and well was she advised!

Having received, by the packet, the "particulars to elucidate this business," Portugal at last screws her courage to the sticking-point, and, backed by England, for the first time denies this claim, after a lapse of thirty years, and charges the violation of her neutrality on the Americans! Let us examine this remarkable document of Señor De Castro, which will be found on p. 48, Doc, 14, dated 3d August, 1843. He says: "The accounts *received*" [from England, of course] "all agree that the American brig, under the pretext that four boats from the said British vessels were approaching her, fired upon them, killing some of the men and wounding others."

"It is *alleged*, on the part of the United States, that these boats contained armed men, who had a hostile intention. At the same time, it is *affirmed*, on the part of Great Britain, that they only carried *inoffensive men*, who were going ashore from their ships, on duty, and that they casually met the American brig when she was *preparing to leave the port of Fayal*."

"The government of his Britannic Majesty, *appreciating* the rashness" [this is a bad translation; it should read "*censuring* the rashness"] "with which his officers acted in a neutral port against said

brig, without first recurring to the authorities of the country, *had no hesitation in apologizing to the Portuguese government, and indemnifying the inhabitants of Fayal* for damages sustained by the firing of the British vessels."

Here is where the wily minister overleaped the bounds of his sagacious diplomacy. England did not intend that he should "elucidate this business" that far! For, while he makes a vain endeavor to escape from the liability imposed, he tacitly acknowledges it, and very clearly discloses the interference of England in this negotiation, and the fact that Portugal would never have contested this claim, but for the interposition of the known influence of England to delay and ultimately defeat the recognition and payment of this just demand. He asserts here, what he knew to be false, that the apology and indemnification made by England was a voluntary act of generosity!

This distinguished diplomat concludes his remarkable State paper with the following piece of *Blair's rhetoric:*

"By an analogy of reasoning, far from her Majesty's government being considered as bound for any indemnity for the destruction of the American brig, it would have every motive for asking and expecting an apology for the attempt committed in the Portuguese territory by that brig; seeing that the first shot was unquestionably fired by her, and that the commander did not previously have recourse to the authorities of the country, which was only done by the American consul after the offensive provocation was committed by said brig, and that the fatal consequences were inevitable."

In this letter, Portugal for the first time admits that England *censured* the rashness of Commander Lloyd's conduct. Count Tojal, in his letter to Mr. Hopkins, 29th September, 1849 [p. 34, doc. 53], reiterates it, and says, "*that it is well known that the British government had already, in* 1817, *disapproved of the conduct of Commander Lloyd*, thereby giving satisfaction to his Majesty's government." In his letter to Mr. Clay, 9th March, 1850 [on p. 51, doc. 53], Count Tojal says: "In 1814, the government of her Britannic majesty, through

Lord Bathurst, the minister of foreign affairs, directed Mr. Canning, ambassador at Lisbon, near the regency, to give the Portuguese government a verbal satisfaction for the occurrences which had taken place, and which resulted in the destruction of the privateer General Armstrong, in the port of Fayal, *justifying, at the same time, the conduct of Commander Lloyd*, in regard to the provocation given by the American privateer, which was the first to fire upon the English." Again, in his letter to Mr. Clay, of 15th May, 1850 [p. 62, doc. 53], he says, "It was owing to this particular circumstance that the government of his Britannic majesty *neither disavowed nor condemned the conduct of Commander Lloyd* (as it has been asserted), *being of opinion, and having likewise always maintained, that the conduct of Commander Lloyd was fully justified*, as a mere act of retaliation, provoked by the hostilities previously commenced by Captain Reid." And, lastly, Mr. Figanière, the Portuguese minister at Washington, in his labored argument to Mr. Clayton, urging him to arbitrate this claim, and dated 9th July, 1850, the very day General Taylor died! [at p. 107, doc. 53], makes this remarkable admission: '*the British government did not censure the conduct of Commander Lloyd, on the ground that the neutrality of the port of Fayal had been violated by the privateer's unprovoked attack on the boats;* nevertheless, for the reasons above stated, an apology was due from the British government, and accordingly was rendered to that of Portugal!" Here Mr. Figanière admits that Lloyd *was censured*, but not on the ground of the privateer's unprovoked attack on the boats, *but on the ground of the boats' unprovoked attack on the privateer!*

Sirs, it was asserted in this court, the other day, that a greater opportunity was afforded to ascertain the truth from the lips of a living witness than from the written declarations of a party. I do not think so. For it is, after all, the *language* of the witness that carries with it the force of truth, or the damning falsehood! Compare these miserable, contemptible equivocations of the Portuguese ministers, based on the false statements of Lloyd and Fausset, and

instructed to that end by the English government, with the bold, honest, manly statement of Charles W. Dabney. No comment is necessary.

Now let us examine into the motive that induced "Mad Lloyd" to violate the neutrality of Portugal. Mr. Dabney says that Lloyd had been in Fayal three weeks before, and had *boasted that he had boats built expressly for cutting out American privateers.* In the letter of the British consul, William Greaves, to the governor of Fayal, written on the morning of the 27th September, 1814 [p. 19, doc. 14], he informs him of the intention of Commander Lloyd to send the British brig Carnation to fire on the General Armstrong, and says that, "if the said brig should encounter any hostilities from the Castle, or your excellency should *allow the masts to be taken from that schooner*, he would regard the island as an enemy of his Britannic majesty, and treat the town and Castle accordingly." The letter is a translation from the Portuguese; but the language, "allow the masts to be taken from that schooner," means, if his excellency allowed the Americans to injure their vessel in her hull, rigging, or masts, he would regard the island as an enemy, &c. This letter shows the fixed determination of Commander Lloyd, at the moment he entered the port of Fayal, to avail himself of the weakness of that island and the unprotected condition of the American brig, in the presence of his formidable naval force, to capture the brig without damage to her hull, rigging, or armament, and make her a useful adjunct to the naval force then concentrating at Jamaica, of which this squadron was to form a part, and which was destined for the expedition against Louisiana, and the capture of New Orleans. To show that Lloyd's fleet did form a part of this expedition, Lieutenant McKeever, U. S. N., who was taken prisoner in the action of the American gun-boats, commanded by Captain Thomas ap-Catesby Jones, with the flotilla of the British fleet at the attack on New Orleans, was afterwards confined on board the Plantaganet, 74, commanded by Captain Lloyd. And, according to James's *English Naval History*, vol. 6, p. 360, we find that the

frigate Rota, Captain P. Somerville, afterwards made a combined attack upon the frontier town of the state of Georgia, St. Mary's, early in January, 1815. It was simultaneous with the burning of this capitol, on the 24th August, 1814, that the expedition was formed against Louisiana and our southern coast. Admiral Cochrane sailed from Patuxent on the 19th September, 1814, to concentrate his forces at Jamaica for that purpose. All the squadrons, and the reinforcements from England, did not arrive at Jamaica until the 24th November, 1814. Commander Lloyd had been detained at Fayal some ten days. Admiral Cochrane's fleet was delayed at Jamaica from the 19th to the 26th November. This is from the account given of "*A Narrative of the Campaigns of the British Army at Washington, Baltimore, and New Orleans*, by an English Officer who served in the Expeditions" [see p. 242 to 260]. General Jackson arrived at New Orleans on the 2d December, 1814. Cochrane's fleet did not arrive until four days afterwards. If this fleet had arrived one week sooner, nothing could have prevented the British from marching into New Orleans, taking that city, and the possession of the coast as high up the Mississippi river as they could hold it [see Major A. L. Latour's *Historical Memoir of the War of* 1814–15, pp. 63 and 112]. This defence of the Armstrong, then, evidently saved Lousiana from the hands of the British.

The motive for capturing the Armstrong, then, was a double one. Not only to obtain possession of this vessel, celebrated for her audacity and fast-sailing qualities (this being her fifth cruise), but to use her in the shallow waters of Lake Pontchartrain and the mouths of the Mississippi, in the attack on New Orleans.

Commander Lloyd cared not to violate the neutrality of the port of Fayal then, when it became his interest. When did England ever stop to violate public law or private right, or to commit any outrage of pillage, or plunder, when it could subserve her ends? When did she ever hesitate to pervert the truth or to falsify a fact?

When, sirs, she found it necessary to violate the neutrality of

Portugal, her weakness or strength was not taken into consideration.

The same policy is carried out to this day. Have we not seen of late the most glaring outrage committed on our territory—committed in violation of this same solemn compact—in utter disregard and contempt of our national sovereignty—in violation of the sanctity of the holy precincts of our national capitol—have we not seen Mr. Crampton, the British minister, in violation of his office, his honor, and of all principle, and without hesitation, violate the neutrality laws of our country? And have we not seen a British newspaper in New York, the *Albion*, deny the charge, and then in extenuation boldly assert that Mr. Crampton acted with the permission of Mr. Marcy—a falsehood only equalled by that of Commander Lloyd.

It was this same spirit, when this capitol was attacked, that made the British despoil the beauty of the cold, harmless marble statuary—yonder monument to our gallant band of naval heroes. [Mr. Reid here pointed to the naval monument in front of the capitol.]

It was this same spirit that made a British ruthless villain strike, with his sword, the pen from the hand of the "muse of history" (whose womanly form alone should have protected her), saying that, no pen was needed to record the history of so pusillanimous a navy as ours!" Afterwards the gallant Commodore Thos. ap-Catesby Jones, with his own sword, erased the calumny with the blood and death of that British officer at New Orleans, and sent him to acknowledge the falsehood into another world!*

Sirs, the page of history still stands blurred and blotted by British falsehood. Shall not, then, the pen be restored to the hand of the muse, the false and disgraceful record be expunged, and a fair page written, dictated by the decree of this honorable Court, establishing the holy truth? "*Magna est veritas, et prævalebit!*"

* The British officer killed by Commodore Jones was Lieut. G. Pratt, of H. B. M. frigate Seahorse, and the marble pen which he carried with him from Washington, as a trophy, was then in his writing-desk aboard of that ship!

Well, sirs, on the 10th January, 1844, a letter, purporting to have been written by Mr. A. P. Upshur, Secretary of State under Mr. Polk, and signed by him, declined the further prosecution of this claim, on the ground that "argument and importunity have been exhausted, and this government can see nothing in the circumstance to justify or warrant it in having recourse to any other weapons" [see p. 54, doc. 14]. I then urged the government not to abandon this claim, and, at all events, to reply to De Castro's letter, and leave the case in a state of perpetual demand against the Portuguese government [see letter of Mr. Reid to Mr. Upshur, p. 54, doc. 14]. Mr. Upshur having been killed on board the "Princeton," no reply was received to this letter, and the Hon. Henry Johnson, United States senator from Louisiana, was informed by Mr. Calhoun, who suceeeded as Secretary of State, in a letter dated August 5, 1844, that, "The case of the General Armstrong was disposed of by my predecessor upon grounds which appear to me judicious and proper. Of this Mr. Reid has been duly informed, and I can see no good reason, under the circumstances, for renewing the claim, or for continuing a correspondence on the subject."

I think it but proper and just here to remark to your honors that afterwards, in a personal interview, Mr. Calhoun denied ever having written this letter, and stated that such was the pressure of business in the department, that he was forced to rely on the corresponding-clerk, as it was as much as he could do to sign letters. I am of opinion, sirs, that the letter of Mr. Upshur emanated from the same source. I cannot forbear contrasting this conduct of those in the Department of State with a story told of Lord Castlereigh, who was the Premier of England. It seems that an English officer, travelling on the Continent, had, for some unjust cause, been imprisoned, and his effects confiscated, which led to a long correspondence between the two governments. A final reply having been received, the British officer was called to hear the result. Seeing that the officer still looked dissatisfied, Lord Castlereigh impetu-

ously said, "What would you have us do, sir; go to war about this matter?"

"Yes, sir," replied the officer, promptly; "if the reparation due the honor of an officer of England, and indemnity for the injury, cannot be obtained otherwise, I demand that you should go to war."

"You are right, sir," said Castlereigh; "you shall have satisfaction;" and satisfaction was obtained.

The honorable court will perceive that these very refusals of the State Department to prosecute this claim further, were afterwards used in argument by the Portuguese ministers to show the weakness of this demand, and to induce this government to arbitrate the case.

The State Department having abandoned this claim, and refused even to reply to De Castro's letter, Senator Johnson, of Louisiana, introduced a resolution in the Senate, calling for all the correspondence and documents relating to the claim and the causes which retarded its adjustment. Under that resolution, the correspondence contained in Document No. 14 was published in December, 1845. Then came to light, for the first time since these despatches had been received, the proceedings had at Rio de Janeiro, in 1814, which Mr. Kavanagh had in vain so repeatedly called for!

This correspondence was referred to the Committee on Foreign Relations of the United States Senate, which reported on the 19th May, 1846 [1st sess., 29th cong.], through Mr. Atherton. After reviewing all the facts of the case, the committee, in commenting on De Castro's letter, say:

"It is destitute not only of probability, from the situation of the privateer in the presence of a British squadron, but it is disproved by all the correspondence and documents, and has not even a shadow of foundation.

"In addition to this, it is a position entirely new on the part of the Portuguese authorities, assumed, for the first time, by them, nearly thirty years after the events occurred, and not only never assumed, but repeatedly negatived by them, when the facts were recent and well known."

"Adverting to the fact that no reply has been made to the letter of Señor de Castro, the committee would suggest the subject for the consideration of the Department of State, to decide whether further proceedings may not be called for in the case."

I will now call the attention of this honorable court to the report of the Committee on Naval Affairs of the United States Senate, made in January, 1817, 2d Session of the 14th Congress. This committee, after a full investigation of the case, at that time, said :

"It is the duty, no doubt, of all governments to extend to the person and property of the citizen all the protection in their power. It is the end of all governments to do so. It is the right of the citizen to make known his wrongs to his government, and it is the duty of the government to seek redress by such means as it may deem expedient. The neutrality of Portugal was grossly violated in the case of the private armed ship General Armstrong. It was the duty of that government to preserve her neutral character, and to protect the brig and all on board from any hostile attack, while in her port."

"In principle, the committee can see no distinction between a private armed ship and a merchant ship ; nor between property captured and converted to the use of the captors, and property destroyed by a third party omitting to do its duty."

So far back, then, as 1817, it was the opinion of the Senate of the United States, and expressly charged, that England had committed the breach of neutrality, and the responsibility of the government of Portugal for all loss occasioned by such breach is expressly averred.

But, sirs, let us go further back, and see how many administrations have acknowledged the justice of this claim ; because it is asserted in the brief of the learned solicitor that but one administration ever acknowledged it.

We find that under the administration of Mr. Madison, who served two terms, Mr. Monroe acknowledged it. Under the administration of Mr. Monroe, who served two terms, Mr. Adams acknow-

ledged it. Under the administration of General Jackson, Messrs. McLane, Dickens, and Forsyth acknowledged it; and under the administration of Mr. Tyler, Mr. Webster acknowledged it. Here, then, for twenty-eight years, there was a continual acknowledgment, on the part of this government, of the justice of this claim, besides two solemn admissions and declarations on the part of the Senate of the United States, the last which recommended its reference back to the Department of State, notwithstanding the expressed opinions of those in the Department, that "argument and importunity had been exhausted," and that they could see no good reason, under the circumstances, for *renewing the claim*, or for continuing a correspondence on the subject!"

But suppose this claim never had been recognized by the government until General Taylor's administration, the action *then taken*, upon a clear understanding of all the facts and evidence, is conclusive. It was on those facts that General Taylor determined to assert the national honor—*on the admissions of Portugal and England*, and not on the representations of the claimants, that he determined to procure justice, cost what it would. He was a soldier, sirs, and knew well how to protect the honor of his country!

It must be recollected that there were a number of claims besides this, the justice of which Portugal had as tenaciously denied, that caused this determined action, and called forth the high-toned, dignified, but firm language of that great American statesman, Mr. John M. Clayton, in his letter of instruction to Mr. Geo. W. Hopkins, of the 20th April, 1849. I will read a few extracts:

"Sir: Your despatch of the 11th ult. was received here on the 9th inst. I have submitted it to the President, and represented and explained to him the very unsatisfactory condition in which the claims of citizens of the United States upon the Portuguese government have been permitted to remain—many of them for a long series of years, in spite of the repeated remonstrances of the American government, and the untiring efforts of successive diplo-

matic representatives from this country, who have, under instructions, again and again vainly appealed to the government of Portugal for their adjustment and liquidation. These appeals have been encountered by harassing delays, until at length the patience of the claimants and of their government has become exhausted. Reluctant, nevertheless, to take any steps which might, by possibility, hazard the amicable relations of the two countries, and clinging still to the hope that Portugal is not obstinately bent upon closing her ears against a friendly power, by perpetrating the wrongs of which we complain, the President considers his accession an auspicious moment to make one more appeal to Portugal.

"The injustice done us, and the delay of redress, would justify the severest animadversion in speaking of these outrages, which of late seem to have increased in number and magnitude, in a direct proportion to the impunity with which they have been hitherto inflicted. In the intercourse of nations, there is, and ought to be, a limit to such ill-treatment, beyond which endurance ceases to be a virtue. That limit, it is believed, will soon have been reached, if Portugal shall still continue to be deaf to our just complaints. The responsibility must needs rest with her, if the American government should be forced, by a sense of duty and of self-respect, into ulterior measures to enforce its demand. These measures, indeed, which a due regard to national honor may thus render necessary, belong, as you will understand, to the consideration of a distinct branch of the government.

"The oldest case of wrong, and the most remarkable, is that of the privateer General Armstrong, Captain S. C. Reid, destroyed in 1814 by a British squadron, under the guns of the Portuguese fortress which protects the harbor of Fayal, after a defence as gallant and memorable as any act recorded in naval annals.

"It is revolting to contemplate such a succession of unfriendly acts; exhibiting a studied course of conduct inconsistent with the relations which ought to subsist between Christian powers. It is high time that the just indignation of the American government

should be aroused and directed towards the protection of the rights of these, our suffering citizens.

"It is under these circumstances—here rather adverted to than unfolded in detail—that the President has resolved to make one more attempt to procure satisfaction for American claimants, and to assert the national honor; and in this resolve, it will be your duty to convince the Portuguese government that he is in earnest, and will not be turned aside from his purpose. You will impress upon Portugal the idea that, on entering upon the duties of his high office, as Chief Magistrate of the United States, the President determined that he would assert the rights of his fellow-citizens upon foreign governments; proceeding upon the principle, often avowed by our government, 'to make no demand not founded in justice, and submit to no wrong.'

"You will make it distinctly understood that the period of procrastination has gone by, and that immediate decision is demanded. Further delay will be construed into denial. It is in contemplation to lay before Congress the result of this final appeal, at an early period of the next session. Should it so happen, unfortunately, that a satisfactory answer be denied or withheld, until the arrival of the period for making the purposed communication, the subject will then be submitted to that body, as it shall at the time stand; and the Portuguese government may rest assured that any measures which Congress, in their wisdom, may decide upon as due to our citizens and country, will be faithfully carried out by the Executive.

"In presenting this view of the subject to the Portuguese government, as a frank avowal *of a fixed determination* on the part of the United States government, you will be most careful to represent, at the same time, the extreme anxiety of the President to avoid being forced to suspend or interrupt present diplomatic relations with Portugal; because a recourse to that measure would, most probably, prove to be but the antecedent to reprisals."

Sirs, no American can read this language without an innate thrill

of admiration! This acton, on the part of Mr. Clayton, was the result of cold, dispassioned reflection. He had thoroughly investigated the case. He had closely analyzed all its features and principles. He had carefully weighed all the evidence; he had calmly reviewed all its legal bearing under the code of nations; and that distinguished jurisconsult, Castlereigh-like, resolved to maintain the honor of our country, and the rights of our citizens. He determined that all these claims should be paid, or he would accept the payment of none. They had at this time agreed to pay all the other claims, without reference to their justice or injustice, if Mr. Clayton would consent to arbitrate the Armstrong claim. But Mr. Clayton well knew their subtle policy, and was aware of the secret intrigues of England. Mr. Bulwer, the British Minister, had called on Mr. Clayton, and urged the acceptance of the offer made by Portugal; but Mr. Clayton rebuked his impertinent interference, for he well knew that if he held out, that Portugal would eventually pay this claim with the rest.

We have seen, by the correspondence of Messrs. Hopkins and Clay with Count Tojal, that the latter unwittingly disclosed the fact of England's acknowledged admissions of her guilt, by the apology of Lord Bathhurst and the indemnity of Lord Castlereigh, which was pretended by De Castro to have been an act of magnanimity, instead of the result of a peremptory demand. No other proof than this was necessary to establish the liability of Portugal. To this day, Portugal has never abandoned the claim against England for the loss of this vessel. When asked, by Mr. Hopkins, if it was ever abandoned, and when? Count Tojal remains silent! And I defy any one to show that England *has ever, officially or in any manner, denied* that Lloyd had not first violated the neutrality of the port of Fayal. No, sirs; Lord Bathhurst and Lord Castlereigh were both well aware of the fact, and the only evidence to the contrary to be found, in all the record, is Lloyd's letter to Governor Ribeiro, steeped in damning falsehoods; as for his poor tool, Lieutenant Fausset, it is but charity to pass over. But if

Lieutenant Fausset *was right*, where, then, I demand, was England's official charge against Captain Reid ?

Mr. Clay makes a demand for the correspondence between Portugal and England which led to the apology and indemnification from Great Britain : Count Tojal again silently refuses to comply ! What does Mr. Clay say on this occasion? In his letter of 2d November, 1849 [on p. 46, Doc. 53], he remarks :

"Your Excellency cannot mean to assert the deposition of Lieut. Fausset *to be an information obtained and procured by the act of insisting upon this claim by the United States government ;* nor that the Portuguese government was not in possession of it a very short time after the occurrence to which it relates ; any such idea is negatived by the date which the instrument bears—the 27th Sept., 1814 ; and it is fair to presume that it was before both the Portuguese and the British governments, when the former demanded, and the latter accorded satisfaction for the outrage.

"Your Excellency has not thought proper to state either by whom *the informations* have been furnished, or in what they consist, by means of which it is now sought to invalidate *all the testimony worthy of credit* upon the claim, and to stultify the conduct of the then sovereign of Portugal. Supposing these informations, if any such exist, may be found in the correspondence which has taken place between the governments of Portugal and that of Great Britain, and anxious to give them all the consideration which they may merit, and which may be necessary to the most perfect understanding of the whole subject, the undersigned *submits a request for copies of all the papers presented by her majesty's government, containing the diplomatic correspondence and evidence which led to the concession of an apology and indemnification from Great Britain. If this be refused,* the government of the United States will be justified in believing that, in the prosecution of that branch of the demand against the British government, *it was maintained and proved by her majesty's government that Commander Lloyd was the aggressor, and the American claimants the injured parties.*"

Now, I ask, why was not this correspondence produced, and the negotiation conducted on fair and open, honest terms? Because, *it would have proved* that Lloyd was not believed by his own government, and it would have denounced him *a liar*, which the statement of Governor Ribeiro had already shown! To shield the falsehood, her Britannic majesty sends an *official letter* to her faithful majesty, stating that, *the assertions in regard to such censures were entirely destitute of foundation!* Not that he did not violate the neutrality of the port—no official letter on that point—but that he was not censured. The gross misrepresentations on this point, and the miserable decrepitude of truth on the part of both England and Portugal, are such, that I leave it for this honorable court to decide if either are entitled to belief?

It must be admitted that it was a most one-sided negotiation—they having had the benefit of all our correspondence, even to the *private letters* between the Department and the claimants, while we were kept entirely in the dark!

On the peremptory demand being asserted to Portugal, she proposed to pay all the other claims, if the United States would agree to arbitrate the General Armstrong claim. General Taylor peremptorily refused, in accordance with his previous *fixed determination* "to assert the rights of his fellow-citizens, and to make no demand not founded in justice, and to submit to no wrong."

Final instructions were then sent by Mr. Clayton to Mr. Clay, in the dispatch of the 8th March, 1850 [p. 68, doc. 53], which says: "In regard to a reference of our claims to an arbiter, which has been indicated, the President has directed me to say that *no such course will, under the circumstances, receive his sanction, and this for reasons too obvious to need enumeration.*

"The ship-of-war sent to convey these instructions and to receive the answer to them, will await a reasonable time for the answer, and if, by or within that period, satisfaction is not given, and due provision made for the payment of our citizens, you are ordered to demand your passports and return to the United States."

Mr. Clayton has been charged with bullying Portugal, and threatening to declare war against her, if she did not pay these claims. No such accusations can for a moment be sustained. In his letter to Mr. Hopkins he expressly states, "These measures, indeed, which a due regard to national honor may thus render necessary, *belong, as you will understand, to the consideration of a distinct branch of the government.*"

Again, he says, "*It is in contemplation to lay before Congress the result of this final appeal at an early period of the next session.*" The whole matter, then, was to be submitted to the Congress of the United States for its decision, and this charge of threatening Portugal with war was but the reiteration of the *English press*, which went so far, even, as to substitute England for Portugal in meeting the responsibility of rejecting this claim at all hazards. The United States was taunted with the injustice and want of magnanimity displayed in the demonstration of a naval force to demand the payment of this claim. And yet this magnanimous England, and her American adherents, were well aware of the fact that the waves had hardly covered over the track of her own national ships from the shores of helpless Greece, whom she forced to pay a trumped-up demand, without a shadow of right or justification! Portugal, thus encouraged and sustained by England, refused to comply with the demand, and Mr. Clay took his passports and left in the war-steamer Mississippi for France.

On the 9th July, 1850, a great calamity befell the nation, and the claimants, by the death of General Taylor. Mr. Fillmore became President of the United States. Mr. Webster succeeded Mr. Clayton as Secretary of State, *and three days afterwards*, about the 23d July, he agreed with Mr. Figanière to arbitrate this claim!

I contend, here, that there was no power that had a right to reverse the decision of General Taylor, who had prepared to submit the case to Congress for its decision, any more than it was contended we could not reverse the decision, or refuse to obey the decree of Louis Napoleon!

The fiat of this great republic had gone forth to the world. This government had plighted its national faith and honor, and solemnly declared that it would never consent to arbitrate this claim. No power on earth had the right or the authority to reverse this decision but Congress. It had passed out of the functions of the State Department, and the case stood appealed to the Congress of the United States. No succeeding administration had any control or jurisdiction over the case. Such was the unanimous opinion of the Committee on Foreign Affairs of the United States House of Representatives, at the first session of the 33d congress, composed at that time of some of the most distinguished jurists of the country. Such was the opinion of the celebrated attorney-general, William Wirt, in the cases of *Pottinger and Spense* [see Opinions of the Attorneys-General of the United States, vol. 1, p. 486]. Thus was the honor and faith of the government repudiated for the first time, and this great and glorious Republic made to stand in shame, before the eyes of the nations of the world, in the humiliating and degrading position of having asserted the national honor, and afterwards sullied it by a retraction!

But, may it please this honorable Court, while I do not question the reason or the motive of Mr. Webster in agreeing to submit this case to arbitration, I do not hesitate to say that I believe he committed a great error of judgment. His was *certainly not* an act of "*intrinsical indifference*," "*without which*," says Puffendorf, "*all the morality of human action is inevitably overthrown.*" The reason why Mr. Webster agreed to refer this claim to arbitration was that he felt perfectly confident that Louis Napoleon, as President of the Republic of France, would decide in our favor. I know this, because he told me that no man could decide the case against us.

Mr. Webster may be censured for this act, but I cast no reflections on his character. Daniel Webster has erected for himself a superstructure of grandeur, over which the fixed meridian sun of his genius will shine resplendent for ever, and on which, no act or error of his past life, can for a moment cast the slightest shadow!

I shall now proceed to evidence to your honors under what circumstances the government of the United States accepted the proposition of Portugal to arbitrate this claim, and the nature of that proposition, which Mr. Clay had not only been instructed peremptorily to reject, but to enforce the payment of this particular claim.

In the letter of Count Tojal to Mr. Clay, of the 6th July, 1850, replying to the final demand of this government, is presented this extraordinary proposition :

"The government of her majesty, animated with the same desire which the government of the United States professes, to maintain, without interruption, relations of good harmony and intelligence between the two countries, *yields to the force of circumstances, and, without again reverting to the justice or injustice of the claims presented* by the government of the U. S., and only *pro bono pacis*, offers to pay the said mentioned claims, amounting to $91,727, according to Mr. Clay's account, with the *only* exception of that of the privateer General Armstrong.

"In respect to this claim, the undersigned cannot deviate from the proposal heretofore made to Mr. Clay, that of so important a claim being submitted to the decision of a third power, &c."

It is true, that, at first blush, no exceptions can be taken to the diplomatic language here used, as well as to the manner in which the *proposition* is put. But on a closer examination, *the infamy* concealed under it is plain and palpable. And, sirs, what is the *induction?* Why, it is this, "if you will surrender the chastity of your honor, by agreeing to arbitrate the "General Armstrong" case, we will pay all the other claims, *without reference to their justice or injustice!*" This is no morbid or forced construction, because, antecedent to this proposition, the wily minister makes this declaration :

"Her majesty's government, far from denying justice to the government of the United States, *always proposed*, in the respective answer to each claim, *to refer them to arbitrators, as the most decor-*

ous and adequate mode to resolve these claims." The *motive* for resisting this claim, and which induced Portugal to make this proposition, is distinctly declared in the following sentence :

" Her majesty's government, besides the arguments contained in the notes formally addressed to the government of the United States, *finds its judgment, and the manner of weighing the question of the privateer General Armstrong, strengthened with the opinion of her Britanic majesty's government, which has always deemed this claim of the United States unjust!*"

In reply to this proposition, Mr. Clay, in his letter of the 7th July, 1850, states, " that the instructions of his government do not allow him to entertain any proposition which has not for its object *the adjustment and final settlement of all the said claims without exception ;* he therefore declines to accede to the proposition of his excellency as above stated, to pay all the other claims except that of the General Armstrong, and to refer it to arbitration."

Again, in his final letter of the 11th July, 1850, demanding his passports, Mr. Clay says : " *This proposition does not admit the justice of any single one of the claims to which it refers,* but merely states, as above quoted, that the government of her most faithful majesty is willing, *for the sake of peace, impelled by the force of circumstances, and without considering their justice or injustice,* to pay some of them." This language shows that Mr. Clay well understood the infamy contained in the proposition, and that the terms *for the sake of peace* concealed the offer of the *purchase-money* for the dishonor of our government !

I wish here to substantiate the fixed and determined resolution on the part of General Taylor, as made known to the Portuguese government, under no circumstances to consent to arbitrate this claim. While the negotiation was being conducted at Lisbon, Mr. Figanière, the minister resident at Washington, was duly advised of all the proceedings, and had, in the meantime, opened a correspondence with Mr. Clayton. In reply to a letter of Mr. Figanière, urging a reference of this case to a third power, Mr. Clayton, on

the 30th April, 1850 [p. 97, doc. 53], said: "The undersigned, in conclusion, is compelled to add that, should the Portuguese government persevere in the refusal to adjust and settle what are believed to be *the incontrovertible claims* of American citizens upon that government, the only alternative left to the President will be immediately resorted to—*the submission of the whole subject to the decision of the Congress of the United States*, whose final determination as to the mode of adjustment will have all its appropriate and legitimate influence upon the course of the executive."

Again, on the 19th June, 1850 [p. 186, doc. 53], in reply to Mr. Figanière's trumped-up and obsolete reclamations on this government, as a set-off against our demands (and which shows the weakness of his defence), Mr. Clayton says: "In conclusion, sir, I beg leave to repeat to you the assurance contained in my note of the 30th May last, 'that the just claims of the citizens of this country upon Portugal will lose none of the merit which characterizes them, *nor any portion of that protection which this government has determined to extend to the claimants*, by the resuscitation of such unfounded pretensions."

In a private letter [marked F] from Mr. Clayton to myself, dated June 25, 1852, he says: "General Taylor *refused, to the last moment of his life, to submit the Armstrong claim to arbitration.*"

Now, if the honorable court please, I shall demonstrate that in consenting to submit this claim to arbitration, the government accepted and received *a bonus* in consideration therefor. The official letter of Mr. Webster to Mr. Figanière, of the 5th Sept., 1850 [p. 112, Doc. 53], expressly declares it. He says: "The President instructs me now to say that, sincerely wishing to preserve relations of amity with Portugal, and to bring pending questions to an immediate close, *the government of the United States accepts Count Tojal's 'offer,'* in behalf of his government, *to pay the several claims*, as stated in Mr. Clay's note; *and the proposition* made by the same authority, *to refer the case of the General Armstrong to arbitration.*" The *first article* of the Convention, afterwards made,

also expresses it. It states that the Queen of Portugal "has assented to pay to the government of the United States *a sum equivalent to the indemnities* claimed for several American citizens (with the exception of that mentioned in the fourth article), *and which sum the government of the United States undertakes to receive in full satisfaction of said claims*, except as aforesaid, and to distribute the same among the claimants."

We have seen that Portugal not only objected to this claim, on pretended principles of law, but to all the claims, on the same grounds of inadmissibility, which she likewise urged the United States to arbitrate. All these claims were apparently equally objectionable to her, and as firmly resisted as the Armstrong case. Then, why was it that the offer was not made to pay *this claim* and refer the *others* to arbitration, as she *had yielded to the force of circumstances, and, for the sake of peace, was willing to pay all the other claims, just or unjust*? Because, sirs, England had forbidden her, and, as a mere dependency of Great Britain, she did not dare to disobey her. In the language of Count Tojal, who cringingly supplicates Mr. Clay to separate this from the other claims, on the infantile plea and mortifying admission that "*The subsisting relations* between her most faithful Majesty, and that of her Britannic Majesty, *oblige him to communicate to the British government all that had taken place!*" [See p. 77, Doc. 53.] What does this reveal? It reveals that England had instructed Portugal to pay all the other claims, provided we would agree to arbitrate this one (she well knowing that no power in Europe would decide in our favor), and not to pay any of the other claims, only on the condition, and in consideration, that we would arbitrate the Armstrong claim! Now, sirs, what was the *offer*, on the part of Count Tojal, that the President accepted? Was it a simple offer to pay all the other claims, without reference to the Armstrong claim; or was it a conjunctive proposition? If it was not a conditional offer, why did Mr. Clay refuse to accept it before he left Lisbon? Because, he tells you, his instructions did not allow him *to entertain any proposi-*

tion which had not for its object the adjustment and final settlement of all the claims, *without exception!* Will it be pretended for a moment that it was an unconditional offer to pay all the other claims, whether we consented to arbitrate this claim or not? Would Portugal ever have consented to pay those claims, if we had refused to arbitrate this one? No, sirs, never—and the proof is irrefragable that, in consenting to arbitrate it, we received *a bonus* in the payment of the other claims. On this point, alone, I contend that the government is responsible to the claimants.

We next charge that the agreement to arbitrate this claim was made and entered into without our knowledge or consent. It is shown that, on the 5th day of September, 1850 (the very day I wrote from New Orleans to Mr. Webster), the President's acceptance of Count Tojal's proposition was *officially* communicated to Mr. Figanière; and about *the* 23*d of July*, 1850, the proposition had been *verbally accepted.* What is Mr. Clayton's testimony on this point? In the debate on this bill in the Senate, January 26th, 1855, Mr. Clayton said:

"Well, sir, at this crisis, when all the other claims were about to be paid—and I verily believe this was also about to be paid—the President died. *Within three days* after my successor went into office, he agreed to refer the claim to the Prince Louis Napoleon. I know that, because he called upon me, and, in the course of the conversation, notified me that he had made that arrangement with Mr. Figanière, the Portuguese minister. The proposition to refer had been made to me repeatedly. It seemed as if they were willing I should choose the arbiter. They offered to refer it to three civilians, or to one civilian, or to any crowned head in Europe. I refused. I thought the circumstances of the case so clear against that government, and her conduct so atrocious, that there ought to be no reference of a claim which was so clearly right."

Again, he said: "In this case, the claim was referred to the arbitration without the consent, and without the knowledge of the claimant. He had not the slightest information that such a thing

was in progress. The papers show exactly the opposite of what the honorable Senator [Mr. Fessenden] contended for in this respect. Within *three days* after the matter came into the hands of my successor in the office of Secretary of State, he agreed to refer it. I know this, of my own knowledge. At that very moment, the claimant was confidently expecting that his claim would be paid. Other claims had been given up, and he had every reason to suppose that this, also, would be paid. The claimant wrote to the Department for information, and received the answer which was read by my friend from Mississippi [Governor Brown], that the claim had been referred. Afterwards, the treaty was made, in pursuance of an arrangement, long before agreed on, between Portugal and this government; and the reference was confirmed."

And again, Mr. Clayton said: "It will be remembered that President Taylor died on the 9th July, 1850. On the 18th or 20th July, Mr. Webster became Secretary of State. About the 23d July, the Portuguese minister and the Secretary of State agreed to refer the Armstrong case to the arbitration of Louis Napoleon, on the ground, as I was informed by Mr. Webster, that he was the President of a Republic. The letter that was read by the Senator from Mississippi (Governor Brown), to which my friend referred, containing the remonstrance of Captain Reid against the reference, was dated the 26th of Aug. Another letter (of Mr. Reid), asking an opportunity to be heard before the negotiation should be settled, was dated in September. The question had then been determined; there was an end of it; and he could not possibly do anything about it."

Then, on the 23d of August, 1850, *two weeks before* the President's official acceptance of the terms had been communicated to Mr. Figanière, and before the rumor was made public, Mr. Clay was solicited by Mr. Webster to return to Lisbon, and conclude the bargain, which, for reasons highly honorable and worthy of Mr. Clay, he declined.

But still it is asserted that we *acquiesced* in this arbitration!

Now, sirs, what is acquiescence? According to *Noah Webster*, it *is a quiet assent; a silent submission, or, a submission with apparent content.* Capt. Reid, in his letter, dated at New York, 26th August, 1850, to Mr. Webster, says: "By the recent daily journals, rumors are rife that the claim of the General Armstrong is about to be referred to some foreign power for arbitration. This mode, at best, being considered somewhat problematical, we, the claimants, would respectfully suggest, whether or not a settlement by treaty, or convention, may not in your opinion be preferable, as being most likely to enable us to obtain our demands without the risk of a failure?" Mr. Webster replies to this letter, on the 29th August, 1850, that, "after due consideration, it has been deemed proper to accept the offer of the Portuguese government to pay all our claims, excepting that of the Armstrong, &c." This *due consideration* took place *more than a month before Capt. Reid had ever heard it!* And did Mr. Webster, *at that time*, write to Capt. Reid, or any of the claimants, to consult them or advise them on the subject? No, sirs, they were not taken into consideration. I wrote afterwards, from New Orleans, on the 5th September, 1850, requesting the Department "to make no final arrangement in this case," and requesting it "to be left open until I could have a conference," and hoping that "no steps would be taken which would compromise the rights of the claimants until I could see Mr. Webster." In reply, I was informed that the offer *had already been accepted*, and the fact announced to the Portuguese minister! Can this be tortured into *a quiet assent, or a silent submission*? But for a further explanation of these terms, I refer to Count Tojal. Sirs, there can be no *acquiescence*, no consent *after* the committal of an act of wrong, of injury, or violence. The victim of innocence cannot consent, cannot acquiesce, after the perpetration of an act of violence. The householder cannot consent after the crime of arson has been committed. What folly, then, to talk of an acquiescence *before* an act is even known to be in contemplation, or *after its consummation*, without a knowledge of its existence; the very essence of consent is the yielding

of the mind to a proposition laid bare to it, and there can be *no consent* where the will is not consulted.

I consider that the Hon. Mr. Marcy, in his letter to Hon. J. M. Mason, Chairman of the Committee on Foreign Relations of the U. S. Senate, dated 11th Feb., 1854, lays down the true doctrine governing this principle. He says: "I cannot countenance the principle that, where this government is called on by a citizen of the United States to interpose for the purpose of recovering claims against any other government, *proceeds in good faith for that purpose*, and fails in its object, or obtains what may be regarded as an inadequate indemnity, it places itself in a situation to be called on to pay the claims, or to satisfy the expectations of the claimants. Our government is but an agent in such cases, *and unless it acts against the express or known wishes of those who have invoked its interposition*, it does not, as I conceive, incur any liability whatever to the claimants." It is true, this letter was written at the time, with a view other than that of sustaining the claimants' position, but I shall turn it to good account. And now, I ask, were the proceedings had in submitting this claim to arbitration in accordance with *good faith* for that purpose? Were they not in violation of the *good faith* of the nation pledged not to arbitrate this claim? They most certainly were. And did it not "*act against the express and known wishes of those who had invoked its interposition*," by informing them that their objections and suggestions *were too late*, and afterwards, by concluding and ratifying a treaty *which had been agreed upon before that interposition could, by any possibility, have been invoked?*

Again, sirs, after this treaty was made, I transmitted an argument, in behalf of the claimants, to the Department of State, requesting that it might be forwarded to our minister at Paris, with all the documents therein referred to, in order that the claimants might be properly heard before the arbiter. [See letters of Mr. Reid to Mr. Webster, marked B and C.] The department refused the hearing, on the ground that the terms of the treaty did not permit of it. I then asked to be permitted to present the case to

our minister at Paris, Mr. Rives, and that, through him, the claimants might be represented. And was informed by Mr. John J. Crittenden, on the 29th September, 1851, that "it is not competent for this Department to invest you with any manner of authority to present an argument in the case of the General Armstrong; nor indeed to interfere in any way with the mode of submitting the case to the arbiter, provided for by the 3d article of the convention." [See letter marked D.] Did not the government here again act most palpably "*against the express and known wishes of those who had invoked its interposition?*" I hold, therefore, that the doctrine of Mr. Marcy is perfectly sound on this point.

I wish, here, to show a strange inconsistency on the part of the opposers of this claim. While it is contended, on the most weak and shallow testimony, that England did not violate the neutrality of Portugal, and that we did acquiesce to the arbitration, they attempt to evade the responsibility of Portugal, and the government of the United States, based on impregnable evidence, because of its insufficiency! But I shall leave the honorable court to determine on the weight of this evidence, with the single remark, that had it been laid before the Senate, the treaty would never have been ratified.

Let us now, for a moment, take into consideration this treaty, or convention, by which the rights of the claimants were bartered away. Upon examination, it will be found that it was drawn up without a strict regard to the protection of the rights of the claimants, and that it was made in violation of all principles of justice, and of all rules governing arbitration. The great feature containing the very essence of arbitration, *the hearing and determining upon the law and the facts*, was entirely omitted and unprovided for. [See Civil Code of La., title 19, p. 467.] By the *third* article of the treaty, it will be seen that the evidence of the case is confined and *limited* to the "correspondence" which has passed between the two governments and their respective representatives, and that, under that article, the claimants were not only

denied a hearing, but the most important and essential documents, consisting of Captain Reid's protest, Consul Dabney's letter, and all the correspondence of "1814," were entirely excluded and omitted. To establish this fact, I refer the honorable court to the letter of Mr. Webster to Mr. Hadduck, chargé at Lisbon, dated March 20th, 1851 [p. 85, Doc. 53], in which he says: "I have just had a conference with Mr. De Figanière, and it has resulted *in my determining to yield to his wishes*, that the papers in the case of the General Armstrong may be transmitted to your charge," &c. "When the consent of the arbiter, whichsoever of the two it may be, shall have been obtained, you will proceed to carry into execution the stipulation of the *third article* of the convention; viz., to compare and authenticate, jointly with the Portuguese government, *the copies therein specified. You will understand, of course, that these copies are 'limited' to such communications as have passed between the American Legation* and the Portuguese government at Lisbon, and between this Department and the Portuguese Legation in Washington," &c. It will be remembered, that on the 7th July, 1851, I solicited the Department to forward my argument, and *the documents therein referred to*, to our minister at the court of France. This communication caused the Department to examine and to inquire into the instructions just read, as to what documents had been stipulated upon to be submitted to the arbiter. It was then found that the whole of the correspondence of "1814" had been omitted, which caused the following letter to be written expressly by the Department to Mr. Hadduck, *dated 12th July*, 1851 [p. 86, Doc. 53], for the purpose of correcting this great oversight. "To provide, however, against *the omission of any important part of the earlier portion of the correspondence*, I mean that which passed in 1814 and 1815, in Rio Janeiro, where the court of Portugal, at that time, resided, *and which it could not have been intended to exclude*, I transmit to you herewith a printed copy of the correspondence, as communicated to Congress, on the 15th December, 1845." Well, sirs, just one month and three days *before* Mr. Webster *signed* that letter, the protocol

had been concluded at Lisbon, and sent off to Paris, without including this evidence, and here is the proof of it. Mr. Hadduck, in his letter, dated Lisbon, July 17th, 1851, to Mr. Webster, says: "Sir, I have the honor to inform you that, on the 9th of June, I met her majesty's Minister of State and Secretary of Foreign Affairs, at the Foreign Office, for conference on the subject of the protocol." * * * "With these slight alterations, the instrument *was signed and sealed by us on the day of the conference.* I have informed our minister at Paris of these proceedings." Now, on an examination of the protocol [marked No. 1], it will be seen that no particular correspondence, or evidence, is specified therein, to be laid before the arbiter, while it contains a clause to "bind the respective governments, *and all parties interested, to submit to the judgment and decision of said arbiter.*" This very clause, or stipulation, according to the doctrine of Mr. Marcy, then, creates, of itself, a responsibility on the part of this government to the claimants, in case the claim was *wrongfully or improperly submitted.* And the refusal, on the part of this government, to allow the claimants to be heard through their minister, by a written argument, being in direct conflict with the law governing arbitration, attaches and fixes on this government the duty and obligation to indemnify the claimants, which cannot be overthrown.

But may it please the honorable court, my province has simply been to argue this case upon the facts, and I shall leave it for my learned and distinguished compeers, who will follow me, to sustain the principles of this cause upon legal authorities. It is sufficient for me to say, that the most distinguished Senators of the last session of Congress, the most eminent statesmen and jurisconsults, Messrs. Cass, Clayton, Bell, Brown, Bayard, Dodge of Iowa, Douglas, Foot, Houston, Jones of Iowa, Reid, Rusk, Seward, Thompson of New Jersey, Weller, Wright, and others, supported and advocated this claim, on the principles I have maintained before your honors, it having passed the Senate to a third reading by a majority of five. And I refer this honorable court to the powerful

and conclusive argument, on this point, of the Honorable Senator Bayard.

Senator Dawson, of Georgia, who took the opposite side of this question, thought otherwise. This great publicist and learned commentator on international law, thought we should have looked to *England* at the time for indemnification, and that we had no right to call on Portugal! This advocate of Louis Napoleon and his *just decree* was of opinion that the claimants had no right to be heard, and that his imperial majesty, Louis Napoleon, was not to be expected to condescend to listen to the argument of a humble citizen of the United States! The learned senator, on reflection, deemed it prudent to *suppress* this portion of his speech. But, sirs, the Hon. Jas. A. Bayard, who had denounced this award as atrocious, a senator distinguished for his profound ability, demanded to know from the Georgia senator what panoply and majesty covered this high potentate of France that he could not condescend to be instructed by an argument? He was told, sirs, that if Chief-Justice Marshall could be instructed, and the Supreme Court of the United States have changed their opinions by condescending to hear argument of counsel, there was nothing in the character of this Emperor of France that prevented him from being instructed as well.

The honorable ex-senator from North Carolina, Mr. Badger, who was opposed to this claim, had the temerity to rebuke Mr. Bayard for denouncing the award, because it was charging Louis Napoleon with being either stupid or corrupt. The learned ex-senator, in arguing a cause before this honorable court, the other day, admitted that senators and congressmen frequently made speeches for *Buncomb*, and this may have been a *buncomb* remark of his. Is it not strange, sirs, how circumstances act upon the human will and warp the judgment of the human mind? Is it not remarkable that a senator upon the floor should not be able to see and understand a clear principle of law and equity, which, as a *feed attorney* before a court, he urges, not only with a conviction of truth, and declares his solemn belief, but tells you, to use his own language, that *here* he

has "no dark corners in a district to dread to prevent him from doing justice!" What a melancholy and humiliating admission to have made, and how repugnant to the feelings which should actuate senators, who are the judges of the realm and the great conservators of the rights of the people of this Union!

And now, sirs, let us examine the finding of this award of Louis Napoleon. Supposing it to have been made by the distinguished civilians of France, they certainly cannot plead ignorance of the rules of arbitration. Have they done their duty even as marked out under the lame articles of the convention and protocol? Where is their decision on the public law in the case? Not one word upon the point submitted. Where is there a decision on any single fact stated? Why, sirs, the case is decided upon an entire different theory from that raised either by Portugal or the United States. The award says, "considering that if it be clear that, on the night of the 26th September, some English long-boats, commanded by Lieut. Robert Fansset, of the British navy, approached the American brig, the General Armstrong, *it is not certain that the men who manned the boats aforesaid, were provided with arms and ammunition. That it is evident, in fact, from the documents which have been exhibited*, that the aforesaid long-boats, having approached the American brig, the crew of the latter, after having hailed them and summoned them to be off, immediately fired upon them, and that some men were killed on board the English boats, and others wounded—some of whom mortally—*without any attempt having been made on the part of the crew of the boats to repel at once force by force!*"

This statement is entirely novel, and wholly at variance with the position assumed both by England and Portugal, who only contended that but *one boat* was *unarmed*, while the award considers it *uncertain that any of the boats were provided with arms and ammunition!* Why, sirs, they were not even guided by Lieutenant Fansset's deposition. Can this decision, then, be said to be based on any principle of law, upon the evidence placed before this court, or upon any reason or common sense? I am confident it cannot,

and there is not a court on the face of the earth that would decide that this award is just. It is conclusive, therefore, that the correspondence of "1814" never was before the arbiter. For therein it is seen that, instead of all the boats being unarmed, and no attempt being made to repel force by force, the fire was simultaneous on the part of both, and that the first-lieutenant of the American brig was wounded, and one man killed. Then, when they found the evidence to be imperfect, why did they not act like just men, and call for further testimony? Because, sirs, justice was not to be expected of a man who had become a perjured President, by violating his oath and trampling on the constitution of his country! What *Gunther* writes to *Ligurinus* may well be applied here:

> "When falsehood bare and undisguis'd appears,
> It never can deceive; but when it wears
> The garb of truth, it cheats the heedless ears!"

It became the duty, then, of this government, under the protest of the claimants, to set aside this award, if it did not wish to incur responsibility to the claimants; but, having confirmed the award, she confirmed her responsibility, and there is no escape from this conclusion. But if this award *now* precludes the claimants by its decision, as has been contended, then why, I ask, did not the decisions of Congress, the decisions of the different administrations, and the settled and fixed decision of President Taylor, asserted on the national honor, in face of the world, *before* preclude the reference to arbitration? It was repeated to Portugal, that the "President of the United States would never compromise the dignity of the republic, nor abandon the just rights of his fellow-citizens to attain any end!" Was there not a greater violation of good faith in reversing the decision of President Taylor, and sacrificing the national honor, than there would have been if the government had merely reversed the decision of the perjured Louis Napoleon?

It was asserted on the floor of the Senate, in opposition to this claim, that it would be a dangerous precedent to establish, to make

the government responsible to its citizens for any act of its officers in the conduct of a national affair, which compromised their rights, and that no such act can be binding on the government. Why, sirs, do we not see the government daily holding its citizens responsible for their acts, and are we, in this free and enlightened Republic, to be told, in the language of tyranny and oppression, that "the king can do no wrong!" that there is no responsibility resting on this government towards its citizens? Such a doctrine strikes at the very *sub-stratum* of the compact on which the confederacy of this Union was formed. We know, that, in forming the confederacy, each State gave up a portion of its rights and sovereignty to the general government, in consideration of its obligation and responsibility to protect, maintain, secure, and defend the rights of its citizens. I find, sirs, in the proceedings of the Congress of the Confederation, an address to the several States, prepared by Mr. Madison, Mr. Ellsworth, and Mr. Hamilton, adopted 26th April, 1783, holding this language:

Let it be remembered, finally, that it has ever been the pride and the boast of America that the rights for which she contended were the rights of human nature. By the blessings of the author of these rights on the means exerted for their defence, they have prevailed against all opposition, and form the basis of thirteen independent States. No instance has heretofore occurred, nor can any instance be expected hereafter to occur, in which the unadulterated forms of republican government can pretend to so fair an opportunity of justifying themselves by their fruits. In this view, the citizens of the United States are responsible for the greatest trust ever confided to a political society. *If justice, good faith, honor, gratitude, and all the other qualities which ennoble the character of a nation, and fulfill the ends of government*, be the fruits of our establishments, the cause of liberty will acquire a dignity and lustre which it has never yet enjoyed, *and an example will be set which cannot but have the most favorable influence on the rights of mankind.* If, on the other side, our government shall be unfortunately *blotted with the reverse of*

these cardinal and essential virtues, the great cause which we have engaged to vindicate will be dishonored and betrayed, the last and fairest experiment in favor of *the rights of human nature* will be turned against them, and their patrons and friends exposed to be insulted and silenced by the votaries of tyranny and usurpation." What a commentary is this upon the act of the government in denying to the claimants the rights of human nature? I appeal to this honorable court, and ask, whether "justice, good faith, honor, gratitude, and all the other qualities which ennoble the character of a nation," do not demand that the claimants should be indemnified by their government? But if there be no responsibility in this case, upon what principle, then, is the *forced construction* of an act of a citizen, construed into an acquiescence and a responsibility to release this government? The illustrious General Washington said, in his farewell address, "It is indeed *little else than a name*, where the government is too feeble to withstand the enterprises of faction, *to confine each member of the society within the limits prescribed by the laws, and to maintain all in the secure and tranquil enjoyment of the rights of persons and property.*" What a shadow, what a thing of air becomes this government, then, when all these cardinal and essential virtues become reversed, exposing the claimants to be insulted and silenced by the votaries of tyranny and usurpation!

Sirs, under the Constitution, Congress alone has the power to declare war, and make rules concerning captures on land and water. We have made our own code of the law of nations in this regard—and what is the doctrine as laid down by General Washington? In the case of the British ship Grangé, captured by the French frigate L'Ambuscadé, within the capes of the Delaware, in 1793, the President then said: "Rather than employ force for the restoration of certain vessels which I deem the United States bound to restore, I thought it more advisable to satisfy the parties by avowing it to be my opinion that, if restitution was not made, it would be incumbent on the United States to make compensation." It will not be denied, but that this decree of Louis Napoleon is cruelly disgraceful

and unjust. And what is its effect? The government of the United States is placed in the mortifying and humiliating position of having prosecuted and supported by its honor an unjust claim for thirty-five years, founded only on falsehood. This it is made to acknowledge by receding from the high ground it had taken, and consenting to submit the honor of the country and the rights of the claimants to arbitration. It stamps Captain Reid and his officers, and Mr. Dabney, the consul, as convicted perjurers, and elevates an act of infamy on the part of England to the purity of truth. And yet it is said, this decree is final, and the record must stand!

Sirs, was this case submitted to the people of this Union to-day, their unanimous voices would denounce this decree, and declare justice to the claimants. In this spirit I ask you to refer to the very preamble of the Constitution, which in itself constitutes an appeal to your equity, and covers the history of this case. That preamble guarantees and secures justice, that justice which we seek. That preamble embodies and contains the very essence of the Constitution of the United States, "ESTABLISH JUSTICE," not *law*, which is but a poor substitute. To insure domestic tranquillity, and in providing for it the common defence, thereby promoting the general welfare, and securing the blessings of liberty to those who perilled their lives to establish it—not for themselves, but for posterity, we ask JUSTICE at your hands.

May it please this honorable court, my task is done. You have before you the full history of a case, wherein the claimants have been for nearly half a century gradually sinking under wrong and injustice, until life's hope expiring, many of them have died with it unrequited but by the grave. It was not considered by them, whether they spilt one drop of blood, or their whole heart's blood, in defending the honor of their country, and should it now be considered by this honorable court, whether a precedent can be found to guide you, while you have the Constitution and the eternal truth to sustain you in decreeing JUSTICE?

And I now submit this cause, leaving it to this honorable court to determine whether the stain of infamy shall be obliterated, the honor of our countrymen maintained, and the truth of history vindicated, or whether the damning and atrocious record of the decree of Louis Napoleon shall remain in the archives of the national State Department, as the only monument, erected by this government, in gratitude and commemoration of the act of this heroic Spartan band.

REPORT OF THE SPEECH OF P. PHILLIPS, ESQ.

COUNSEL FOR CLAIMANTS, IN THE CASE OF THE PRIVATEER BRIG GENERAL ARMSTRONG. COURT OF CLAIMS, 28TH AND 29TH NOV., 1855.

May it please your Honors—

After the lengthened narration of the facts and diplomatic correspondence connected with this case, to which your attention has already been called, I feel that I should make some apology for consuming still more of your time in a further investigation of the point, that the neutrality of the port of Fayal was invaded by the British fleet, under Commodore Lloyd, and that the conduct of Captain Reid, commanding the privateer General Armstrong, was not only distinguished by the highest gallantry, but justified on the principle of self-defence. The interest of this question cannot be over-estimated, whether we regard it as determining the character of what our people have heretofore considered one of the brightest pictures of the last war, or affecting the right of the claimants, as now presented to your Honors. My apology, if one be needed, must be rested upon these considerations.

The testimony shows that the transaction occurred between eight and nine o'clock at night; the brightness of the moon enabling all its incidents to be observed by the citizens of Fayal and a number of strangers, who lined the shores of that beautiful bay. [Dabney's and Captain Reid's letters.]

In the protest, drawn up on the day the transaction terminated, 27th September, 1814, it is stated that, during the afternoon of the

26th, while employed in taking on board water, and about sunset of that day, the British brig of war Carnation, Captain Bentham, appeared suddenly doubling round the northeast point of the port. She was immediately followed by the Rota, 38 guns, Captain Somerville, and the 74-gun ship Plantagenet, Captain Robert Lloyd (commanding the squadron). They all anchored about seven o'clock, and, soon after, some suspicious movements on their part, indicating an intention to violate the neutrality of the port, induced Captain Reid to order his brig to be warped in shore, close under the guns of the castle ; that in the act of doing so, four boats approached his vessel, filled with armed men. Captain Reid repeatedly hailed them, and warned them to keep off, which they disregarding, he ordered his men to fire on them, which was done, and killed and wounded several men. The boats returned the fire, and killed one man and wounded *the first lieutenant ;* they then fled to their ships, and prepared for a second and more formidable attack.

The second attack, after midnight, with 12 or 14 boats, is then narrated, which resulted in the total defeat and partial destruction of the boats. The loss of the Americans being "*one lieutenant and one seaman killed*, and two lieutenants and five seamen wounded." The third attack, at daybreak, is then described, and after protesting against the said Lloyd for his "infamous attack," and against the government of Portugal for failing "to protect and defend the neutrality of their port," the protest is sworn to by Captain Reid, Frederick A. Worth, first lieutenant (brother of our late gallant General), Robert Johnson, third lieutenant, Benjamin Starks, sailing master, John Brosnaham, surgeon, Robert E. Allen, Captain of Marines, and four other prize masters of said brig.

These statements are fully corroborated by the letter of our then consul, Mr. Dabney, to the Secretary of State, 5th October, 1814 (American State Papers Naval Affairs, 494), and the letter of Captain Reid, 14th October, 1814, to be found in the same vol., 495. These letters are still more minute than the protest, in describing the details of events which brought on the first engage-

ment, and establish beyond a doubt, if credited, that the brig Armstrong acted wholly on the defensive. In Mr. Dabney's letter, written "nine o'clock at night," to the Governor of the Island, he complains that "his Britannic Majesty's ships had ordered four or five armed boats to surprise and carry off the American armed schooner General Armstrong, which is lying here under the guns of the castle, on the protection of which she regarded herself absolutely in security." But if any doubt could exist upon this point, it would be removed by the letter of Charles W. Dabney, our present consul, 21st May, 1853, written to the Secretary of the State (and on file in his department), in a spirit of patriotic indignation, on hearing of the award made on this claim. He says that, being at the time about 21 years of age, he was sent by his father to recommend Capt. R. to warp his brig under the guns of the castle, his father apprehending danger as soon as he discovered that Lloyd's fleet was in the bay; "that the order was immediately given by Captain Reid, and he went ashore. He then says: "Just as I was landing, ten minutes after I left, I heard the report of musketry. A Captain Smith, who had gone on board to see Captain Reid, came on shore with a message, informing us that, while in the act of warping in, they were approached by four boats, containing by estimate one hundred and twenty men; that they were warned repeatedly not to approach, or that he would fire into them, which, instead of heeding, only seemed to stimulate their exertions, and as there could be no mistake of their intention to take them by surprise, no attention being paid to their warning, the Captain had ordered his men to fire, which was immediately returned from the boats, killing one man and wounding the first lieutenant, but having found their reception too warm, they sued for quarter, which was immediately granted. They were then nearly alongside the Armstrong." The whole of this letter is full of instruction upon the point now in issue, and is now for the first time made public. An accidental conversation with a naval officer, recently from Fayal, having just led to the knowledge of its existence. The high character which the writer enjoys in this

and all foreign countries, invests his statements with a value which cannot be over-estimated.

It will be remarked, that the protest is sworn to by all the officers *save one.* We have the fact that the first lieutenant was wounded in the first engagement; here was an important circumstance sworn to by the officer himself, corroborated by the others. A still more palpable fact was, that one seaman *was killed.* If these things are not true, all these officers have committed willful perjury. They are not circumstances that could be misstated by inadvertence, and yet the English defend themselves on the allegation that their boats were *unarmed.* The omission of the name in the affidavit of the second lieutenant corroborates the statement that he was *killed,* and it will be remembered, as lending great strength to these statements, that they were made *dum fervet opus*—Captain Smith was an eye-witness, and narrated the events before the smoke of the battle had been blown away. There was, therefore, no time for any pre-arrangement of a falsehood, if we could suppose the parties vile enough to intend one, or so foolhardy as to attempt misrepresentation of a scene witnessed by nearly "all Fayal."

Thus far, may it please your honors, we have referred to American witnesses, but we have the testimony of the Portuguese officials entirely confirmatory of their truth. In the letter of the governor to his superior, of the 28th September (Doc. 14, p. 12), he writes, that, having received, at ten minutes past nine, of the 26th, a note from the American Consul, "I went directly to the *castle,* and having been informed of the circumstances which led to these hostile proceedings, I learned that a boat had been sent from the British ships-of-war to examine the privateer, and on its return three others had been sent, *armed,* and that the captain of the privateer not wishing to allow them to come on board his vessel, a fire was begun, on *both sides,* the result of which was, that the second officer of the privateer was wounded, and two English were killed, and seven wounded." From the position of the castle, jutting out into the bay, as described in the chart, from the Secretary of State's office,

its occupants had a most excellent opportunity to witness distinctly the order of events; and it is from Portuguese witnesses we have the fact, that the boats attempted to board the privateer, that the fire which ensued came from *both sides*, and that three boats approached while one was returning.

But the positive terms of harshness in which the governor speaks of the conduct of the British commander is more conclusive than any narration of details. He describes it as "a horrible and bloody combat, *occasioned by the madness, pride, and haughtiness of an insolent British officer*, who would not respect the neutrality maintained by Portugal." In a similar strain is the subject treated by the Marquis de Aguiar in his letter to Lord Strangford, Dec. 22, copy enclosed to our minister Mr. Sumpter [Doc. 14, p. 21]. "On a perusal of these papers his excellency will observe the outrageous manner in which that commander violated the neutrality his royal highness had resolved to maintain during the war, by *audaciously attacking the American privateer General Armstrong*, in the port of Fayal, under the guns of the Castle, &c. His excellency will also observe the *base attempts of the British commander*, at the time he *commenced the unprovoked attempt* on the American privateer, *to attribute those violent measures to the breaking of the neutrality on the part of the Americans, in the first instance, by repelling the British armed barges that were sent for the purpose of reconnoitering that vessel*, advocating, with the *most manifest duplicity, that they were consequently the aggressors*. But what appears still more surprising is the arrogance with which the British commander threatened to consider the territory of his royal highness as enemies, should the governor adopt any measures *to prevent them from taking possession of the American privateer*, which they subsequently plundered and set on fire."

When it is considered by the court how dependent was the relation of Portugal to England, and how reserved and cautious is the general tone of diplomatic correspondence, these outbursts of indignation against this "insolent British officer" afford evidence of the

highest degree that the truth of the American version had been made good by such sources of information as left the marquis no alternative but its full recognition. The marquis not only denounces the British commander, but the governor himself. "The censurable moderation of the governor during these outrages would have induced his royal highness to have immediately caused a process to have been instituted for the punishment of that officer, did not the idea of his having been governed by a wish to guard the inhabitants of that island from the ravages and evils which the British commander would not have failed to commit, merit his royal consideration."

Such language, so bold and outspoken, cannot fail to convince your honors, that when these transactions were fresh, and before the finger of English diplomacy had been thrust into this negotiation, the aggressive conduct of the British officer at Fayal was as unreservedly admitted by the Portuguese as it was strenuously insisted on by the Americans; and more especially when it is remembered that it was directed against a government to whose *generosity, energy, and wisdom*, the Portuguese governor declares his people "owe, in a great measure, if not wholly, the fruits of peace." [Doc. 14, p. 12.]

Acting on these well-ascertained facts, Portugal insisted upon an apology and indemnity from the English government, and received them in 1817 and 1818; but no line of complaint was ever addressed to the American government upon this subject.

Subsequently, and when the influence of the British government made itself felt in Portuguese diplomacy, an attempt was made to break the force of this important admission of the English by denying the conclusions which it was seen would inevitably be drawn from it. Our minister, Mr. Clay, in reply to this denial, then asked for an inspection of the correspondence which had passed between the Portuguese and English governments, that it might be fully seen *what were the grounds* assumed and conceded for this apology and indemnity; and concluded by declaring that, if the correspond-

ence were not produced, he would consider it as proved that it would show Lloyd to have been the aggressor. In all the subsequent correspondence, the Portuguese ministers make *not even the slightest allusion to this request.* [Doc. 53, p. 46.]

The presumptions necessarily arising out of the facts of the case are no less strong in favor of the claimants than is the direct evidence. Chief among these are—1st, The disparity between the forces engaged rendering it improbable that so weak a vessel should draw upon itself a contest which could not result otherwise than in its destruction.

2d. The approach, in the night time, of four armed boats from a hostile fleet, without a flag of truce, or other indication of a pacific character.

These presumptions "are the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection (it is admitted) is not so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, *all evidence to the contrary being rejected;* but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, on the absence of all opposing evidence. [1 Greenleaf Evidence, sec. 33.]

This rule is not unknown to the law of nations, as will be seen in the case of the Atlanta, 6 Rob. Adml. Rep. 440, where a neutral vessel, carrying despatches of the enemy, it was held as a *conclusive presumption* that they were hostile [see also The Pizarro, 2 Wheat. 227, 242; The Hunter, 1 Dods. Adm. 480].

Opposed to all this accumulated proof, is the British account, contained in the letter of Captain Lloyd to the governor of Fayal, and the affidavit of Lieutenant Fausset and some of his crew. In the former it is stated "that *one* of the boats of his Britannic majesty's ship under my command was, without the slightest provocation, fired on by the American schooner General Armstrong, in

consequence of which two men were killed and seven wounded. In consequence of this, I am determined to take possession of that vessel, and I hope that you will order your forts to protect the force employed for that purpose." It is important that your honors should observe that this was the response to the letter of the governor, dated "10 *o'clock at night*," for if it be established that prior to that hour more than *one boat* had encountered the brig, then its silence as to others would be a fraudulent suppression of the truth. It will also be observed, that, in his letter no mention is made of any circumstances explanatory of the object or mission of the boat of the Plantagenet, then lying at anchor a mile from the privateer. This omission is supplied in Fausset's deposition, though it equally ignores the existence in this contest of any but "one boat."

This deposition, dated 27th September, 1814, is found in Mr. Clay's letter to Count Tojal [Sen. Doc. 53, p. 42], and states "that, on Monday, 26th inst., about eight o'clock in the evening, he was ordered to go in the pinnace or guard-boat, *unarmed*, on board her majesty's brig Carnation, to know what armed vessel was at anchor in the bay, when Captain Bentham, of said brig, ordered him to inquire of said vessel (which by information was said to be a privateer). When said boat came near the privateer, the Americans hailed and desired the English boat to keep off, or they would fire upon her; upon which *Mr. Fausset* ordered his men to back astern, and with a boat-hook was in the act of doing so, when the Americans, in the most wanton manner, fired into said English boat, killed two and wounded seven, some of them mortally, and this notwithstanding said Fausset frequently called out for quarters; said Fausset solemnly declared that no resistance of any kind was made, nor could they do it, not having any arms, nor of course sent to attack said vessel. Also several Portuguese boats at the time of said unprecedented attack were going ashore, which it seems were said to be armed." We will pass over the singular construction of this deposition by which the deponent changes his narrative from

the first person, and speaks of himself as "Mr. Fausset" and "said Fausset;" and again changes from the present tense, "and solemnly *declared*," &c. We also pass over the singular paragraph with which it concludes, all tending to raise serious doubts as to its genuineness and fairness. In this affidavit we find that the transaction is confined to the privateer and "one boat." Not the slightest mention is made of any other English boats having been fired into, or in any way involved in an encounter with the brig. The motive of the approach by this "one boat" is declared to have been to make an inquiry merely; and as the order was to inquire of the "Carnation," one of the English fleet, it is somewhat singular that Fausset should have been "*ordered to go unarmed*." The deposition particularly emphasizing the word "unarmed."

The statement of the motive of the approach made it necessary to limit the number to "*one* boat." The deposition, therefore, is very clear that there was only "one boat"—that boat a mere "pinnace," and "unarmed."

That this is false has already been shown; that the lieutenant knew it to be false, is seen in the miserable attempt to bring into the scene of action "*several Portuguese boats at the time going ashore, and which it seems were said to be armed*." It is hardly necessary to say that, if Captain Reid had fired into Portuguese boats and killed and wounded their men, we should certainly have seen something of it in the letter of the governor of the Azores; at any rate, some representation, if not demand for reparation, would have reached our government. This attempt to account for a number of boats, miserable as it is, is important, as showing what at the time was pressing upon the mind of this officer as a difficulty necessary to be overcome—to wit, *that there were other boats in his company*.

Your honors will observe that, from the date of the letter from the Marquis de Aguiar to Lord Strangford, enclosed to our minister, Mr. Sumpter, Dec., 1814, we received no communication from the Portuguese government until that of Señor de Castro's addressed

to Mr. Barrow, on the 3d August, 1843. [Doc. 53., p. 14.] This was in reply to Mr. Kavanagh's note, of 17th February, 1837, and Mr. Barrow's note, 26th May and 10th October, 1842. After near six years' delay, the minister makes a response, in which, after expressing his surprise at the appearance of this claim, "after a silence of so many years," he says that "the necessary orders were given to proceed to the *most exact examination*, from which some delay has occurred in this answer." It was impossible, without them, to obtain a thorough knowledge of a case represented in said notes under such serious circumstances."

Having thus made this "*exact examination*," he says: "The accounts received *all agree* that the American brig, under the pretence that *four boats*, from the said British vessels, were approaching her, fired upon them, killing some of the men, and wounding others.

"It is alleged, on the part of the United States, that *these boats* contained armed men, who had a hostile intention. At the same time, it is affirmed, on the part of Great Britain, that *they* only carried inoffensive men, who were *going ashore from their ships off duty*, and that they *casually met the American brig when she was preparing to leave the port of Fayal*."

The great and controlling fact alleged by the American officers is thus, after the most "exact examination," found to be true by the Portuguese minister; and the value of this finding is enhanced by the consideration that it was stated by one who was seeking every means to defeat their claim.

Having thus determined that the brig was approached by "*four boats*," it became necessary to abandon the ground that the motive was peaceful and lawful inquiry, and for the first time, it is alleged that these boats were going ashore off duty, when they casually met the American brig, an allegation not only novel, but in direct contradiction to Fausset's deposition, and wholly inconsistent with the idea that Captain Lloyd, in his letter, told the "whole truth."

In this connection, it is proper to remark that, down to this period, the deposition of Lieutenant Fausset had never been alluded to in

any of the correspondence. It makes its first appearance in the letter of Count Tojal, written to Mr. Hopkins [Doc. 53, p. 33], on 29th September, 1849, 35 years after the transaction, and after the date of Lloyd's letter and Fausset's deposition, and when driven to the wall by Mr. Hopkins's able argument! The quotation in this letter rendering the account of De Castro wholly inconsistent, the Count is necessarily driven back to the position of the British officers, and his statement proceeds, like theirs, wholly to ignore the fact of there being but "one boat," and concludes with the declaration "that this serves to show the incorrectness of the statement, that the barges which *first* approached the privateer were *four* in number, and all armed; whereas the *first* was alone and *unarmed*, and consequently the fire made upon her was, by no means, provoked, and especially not made in self-defence, as is alleged."

Your honors will perceive that this is not an express denial that "four boats" approached the Armstrong, but only that Fausset's was the "first," nor does it deny that there were boats armed, but only that Fausset's was not. Now, we can reconcile all the statements upon this point. It will be remembered that, in Captain Reid's letter, he states that the boats came from the Carnation. Fausset admits that his boat did advance from the Carnation. The evidence also shows that the Carnation was anchored within half pistol-shot of the Armstrong. Now, supposing that the object being to surprise the privateer, four boats put off from the Carnation, Fausset's in the lead, unarmed, his object being to engage the officers of the privateer in a parley, and thus throw them off their guard, while the other boats came up. Fausset fails in this *ruse de guerre*. To save himself, he pushes off with his boat-hook, and is getting out of the way when the other boats come up; the fire is opened and returned, by which men in Fausset's boat are killed and wounded, being within range although retreating. Thus Lloyd's letter and Fausset's deposition, as to the fact of the first boat being unarmed, may be, true without at all invalidating the sworn testimony of all the American officers, of Captain Smith, who was on

board, and detailed the transaction a few minutes after it occurred; of the governor of the Azores, from information derived from his people at the castle; from the Marquis de Aguiar, and finally, as late as August, 1843, from De Castro.

Returning now to an examination of the transaction, as tested by the probable motives of the parties, and by their character, we find the commander of this fleet characterized by insolence and unrestrained daring. The testimony of C. W. Dabney shows that he had acquired in the British navy the title of "Mad Lloyd." It also shows that his conduct to the governor of the Azores was overbearing to the last degree. In his first letter to the governor, informing him of his intention "to take possession" of the Armstrong, he expresses his expectation "that he will order his fort to protect the force employed for that purpose," and through the note, written by the English consul, at his instance, he declares that he will send a brig to fire on the schooner, and that, if he (the governor) should allow *the masts* to be taken from the schooner, he would regard the island as an enemy of his Britannic majesty, and would treat the town and castle accordingly. [Greave's letter, 27th September, 1814. Sen. Doc. 14, p. 19.] Demands such as these, requiring a neutral government not only quietly to submit to an invasion of its rights, but to share in its own degradation, could only proceed from a madman or a despot.

But it is not, may it please your honors, alone for the purpose of exhibiting the lawless insolence of this officer that I refer to these letters. They contain the *motive* which induced this invasion. The object clearly was to obtain "*possession*" of the privateer; thence the anxiety that the governor should not permit the "*masts*" to be taken from her. It is known, as a historical fact, that she was part of the fleet ordered to rendezvous at Jamaica, for the purpose of attacking New Orleans, and this light draft vessel was deemed important for the navigation of the Mississippi. This is the reason why, although the brig Carnation had anchored within pistol-shot, she did not at once use the means for *destroying* her. Two attempts

were made to capture her by boats. These failing, the Carnation made a demonstration the next day, but ascertaining that capture was impossible, she finally resorted to destruction. In addition to all this, we have the letter of Mr. Charles W. Dabney, our present consul, already referred to, testifying that Captain Lloyd had, a few weeks before, publicly "declared in Fayal that he had boats prepared for cutting out privateers, and that he would take them wherever he found them."

Again, we have the evidence of history, that such violations of neutrality by British officers, were of frequent occurrence. Mr. Monroe, writing to Mr. Sumpter, on 3d January, 1815 [Doc. 14, p. 20], while instructing him as to this very case, says: "The *growing frequency of similar outrages, on the part of Great Britain*, renders it more than ever necessary to exact from nations in amity with them a rigid fulfillment of all the obligations which a neutral character imposes," and in less than ten days after this occurrence, the governor at Fayal is called upon to witness another flagrant outrage of the rights of his port by another British captain. On the 4th October, 1814 [Doc. 14, p. 19], he writes to Aceredo, "By my letter, of the 28th ult., your excellency is informed of all the painful occurrences which have taken place in this island, on the 26th of that month. By the accompanying copy, No. 1, your excellency will see how the British commander Somerville acted *against the general law of all nations, and in manifest violation* of the 14th article of the Treaty of Commerce and Alliance between his Britannic Majesty and our Lord the Prince Regent."

We have now gone through the evidence. In this long procession of witnesses, there is one looked for but not found. We nowhere see the British consul. From his residence at Pico, at the mouth of the harbor, he sent a messenger to the Plantagenet as she passed his island home. That messenger doubtlessly informed the commander, as did the pilot, who, and what it was that carried so saucily the "bit of striped bunting" that was floating in fancied security under the guns of the Portuguese castle. The consul how-

ever, nowhere appears among those British officials who seek to tarnish one of the brightest actions of our naval history. His absence is honorable to him, and speaks volumes in favor of that judgment, which, in the name of the country, and in vindication of truth, we now demand. Let this controversy for indemnification terminate as it may, we desire that the fame and good name of the gallant officers and men associated with this memorable transaction should be freed from the stain which an unjust and false award has stamped upon them.

Assuming, as I think we have a right now to do, that the British boats approached the privateer for a hostile purpose, it can scarcely be necessary to adduce authorities to prove that this was a violation of the neutrality of Portugal. It is not necessary that the measure should in itself be absolutely hostile. It is enough that it necessarily *leads* to hostility. [Wildman, 2 vol., 148, Twee Gebroeders ; 3 Rob. Admr., 164, Nancy Bee, p. 7.]

If then our rights have been invaded in a neutral port, and our property destroyed, we are entitled to reparation. It is no answer to our demand, that Portugal was weak and unable to afford protection. Portugal, as a sovereignty, stands among the Nations, demanding equality of privilege. She is entitled to it, but this right carries along with it, equality of obligation. Equal privileges and equal obligations go hand in hand ; when a nation can no longer fulfill the latter, she must yield up the former and be incorporated with some other nation capable of discharging national obligations. There is no measure for determining the obligations of nations according to their strength, any more than there is for determining the duties of individuals. "A dwarf is as much a man as a giant. A small Republic is no less a sovereign state than the most powerful Kingdom. Whatever, therefore, one state has the right to do, so may any other, and whatever one state is bound to do, so must every other." [Vattel's Law of Nations, Prelim., § 18, 19. Woodern Lectures, 1 vol., p. 41.]

These great principles seem to me to be sufficient to dispose of

this point, and to the non-observance of them may be attributed some of the apparent conflict which I frankly confess is to be found in the books. The most of the learning to be met with in the elementary treatises has reference to illegal capture and *restitution*. The principle that restitution is due is universally admitted, and it is difficult to understand upon what reasoning the neutral is bound to restoration, which is not equally applicable to reparation where restitution is impossible. Chancellor Kent, speaking on this subject says: "It is not lawful to make neutral territory the scene of hostility, or to attack an enemy within it; and if the enemy be attacked, or any capture made under neutral protection, the neutral is *bound to redress the injury* and effect restitution." [1 vol. Com., p. 122.] I do not find that the obligation of restitution is at all limited by the power of the neutral government.

The case of liability for destruction is broadly stated by Molloy in his "Jure Maritimo," in illustration of which, after reciting notable instances of adherence to neutral rights, he says: "But they of Hamborough were not so kind to the English when the Dutch fleet fell into their road where rid at the same time some English merchantmen, whom they assaulted, took, burned and spoiled; for which action and not preserving the peace of their port they were, by *the law of nations*, adjudged to answer the damage, and I think have paid most of all of it since." [7 Edition, B. 1, C. 1, p. 13.]

It was questioned whether, in cases of restitution, the expense should not be borne by the injured party. But this is treated by Bynkershoek with somewhat of scorn. "That the injured party should bear the expense appears to me to be very unjust, as it is the duty of the sovereign of the territory to revenge the injury done to himself; for it is an injury done to him to violate a port which is equally open to all his friends. *And what if he who committed the violation goes away immediately?* Is the individual whose vessel has been taken, to make war at his own expense?" He then proceeds to cases where nations have entered into treaties which stipulate that the Government will use their *utmost endeavors* that the

captured property should be restored." And says: "If it be the duty of the sovereign to use his utmost endeavors to effect that purpose it follows that he must do it at his own expense. Nay *by going to war, if other means are insufficient.* Such is the law which is observed among all nations. (Bynkershoek's Law of War, by Duponceau, p, 60.) These citations maintain the only true rule by which the relation of nations can be safely governed, *to wit* "That whenever the law of nations imposes a positive duty; it at the same time imposes a positive obligation to indemnify for losses sustained on account of the non-fulfillment of that duty."

If we were to test the liability of Portugal by the rule contended for by her own ministers, that a neutral is not liable for losses when she employs "*all the means in her power*" to prevent them, it would be difficult to find in the occurrences an escape from responsibility—for no means but two imploring notes were used by the Portuguese officers.

But if the liability of Portugal was otherwise doubtful, our own construction of the law of nations would seem to be conclusive. On January 3rd, 1815, Mr. Monroe to Mr. Sumpter: "The President does not entertain a doubt of the promptitude which the Prince Regent will manifest, particularly when he is informed of the aggravated nature of this case. You are requested to bring all the circumstances of the transaction distinctly to the view of the Portuguese government, and to state the claims which the injured party has to *immediate indemnity.*" [Doc. 14, p. 20.]

Mr. Adams to the Chevalier Corrende Serra, March 14, 1818: "Of the facts of the case, there is, and can be no question, having been ascertained not only by the statements of the injured parties, but by the official reports of your own commanding officer. It is hoped your government will, without further delay, grant to the sufferers by that transaction the full indemnity to which they are by *the laws of nations entitled.*" [Doc. 53, p. 13.]

Mr. Dickens to Mr. Kavanagh, 20th May, 1835: "The Portuguese authorities at that place (Fayal) having failed to afford the

vessel that protection to which she was entitled in a friendly port which she had entered as an asylum, the government is unquestionably bound, by the law of nations, to make good to the sufferers all the damage sustained in consequence of the neglect of so obvious and acknowledged a duty." [Doc. 53, p. 24.]

Mr. Webster to Mr. Barrow, 15 January, 1842 : "Upon receipt of this letter, you will, without delay, make yourself acquainted with the circumstances, and address a note to the minister. The amount of the claim the Department will not attempt to fix ; *but its justness, I believe, has not been denied.*" And again, on 18 August, 1842 : "Both these claims *are regarded as just by this government, and will not be relinquished under the objections heretofore made to them by the Portuguese government, which are entirely unsatisfactory.*" [Doc. 53, p. 40, 42.]

Mr. Clayton to Mr. Clay, 8 March, 1850 : "If within that period, satisfaction is not given and due provision made for the payment of our citizens, you are ordered to demand your passports, and return to the United States." [Doc. 53, p. 68.]

The court will remark, that at the time Mr. Webster declared that "the claim will not be relinquished under the objections heretofore made," Portugal had assumed the ground now attempted to be maintained by the solicitor—that her weakness and inability to afford protection, freed her from responsibility for the loss sustained. [Kavanagh to Forsyth, 18 March, 1837. 4 Sept., 1837. Doc. 14, p. 33, 34.]

Under these repeated assertions, emanating from the Executive of this government, our ministers at Portugal continued to press the claim, as one founded upon the law of nations, and uninfluenced by the question of the relative power of the two governments of Portugal and England. The force of these admissions is attempted to be broken by the argument, that they were the mere statements of an advocate pressing the claim of his client ; with proper respect to the solicitor, it seems to me that this comparison is derogatory to the dignity of the government which he represents. No govern-

ment, under the law of nations, is justified in demanding from another what it is not ready to give under similar circumstances. If Portugal had yielded to our assertion of right, and a similar demand against us had been presented by another nation, no American minister could have been found so wanting in self-respect, as to have shielded himself behind the argument now set up.

Upon these principles we assert, that the present claimants had a demand for indemnification against Portugal. This demand having been released through the action of this government, the question now is, whether this has been effected by such means as to make it liable to indemnify them.

In looking through the voluminous documents which make up the history of this case, we are struck with the repeated misfortunes (I use the mildest word), it has been subjected to. From December, 1815, to May, 1835, the government seemed to have wholly abandoned the interest of the claimants. During this whole period of twenty years there is not a line addressed to the Portuguese government; when it is resumed in 1835, we find our minister, Mr. Kavanagh, reporting *de novo* to our Secretary of State, the facts of the case, wholly innocent of all knowledge of past negotiations, [30 Jan., 1836 to Mr. Forsyth, Doc. 14, p. 28], and stating further, that there was no record in the archives of the correspondence with Mr. Sumpter. In this letter, as in the one under date 26 December, 1836 [p. 31,] Mr. Kavanagh also writes, that he had withheld the Armstrong case, to "*prevent embarrassment in the settlement of the others.*"

When, finally, the Armstrong case is again presented to the Portuguese government, it is upon the letter of our consul enclosing copy of Captain Reid's protest, and the prior letter of the consul, written during the night of the engagement. These are the documents, solemnly paraded, and more, solemnly marked, A, B, C, upon which the controversy was resurrected from the sleep of death, to which the government had apparently consigned it.

[Kavanagh to Minister Foreign Affairs of Portugal, 17 February, 1837. Doc. 14, p. 32.]

As may have been anticipated, the first reply of the Portuguese government, opens with the declaration—"That her majesty's government cannot but be surprised, that this claim has made its appearance after a silence of so many years." [3 August, 1843. Doc. 14, p. 18.] How feeble was the attempt to explain this apparent abandonment, will be seen in the letter of Mr. Hopkins to Count Tojal, and the reply thereto. [Doc. 53, p. 21, 34.]

The next stage in this diplomacy, is the peremptory demand made by Mr. Clay, under the instructions of Mr. Clayton [Doc. 53, p. 69], in which he limits his stay at the Portuguese court to 20 days, without a satisfactory adjustment of all the American claims, and here again we find the unfortunate claim of the Armstrong overshadowed and subordinated. Count Tojal, in his reply of 6 July, 1850 [Doc. 53, p. 73], "yields to the force of circumstances, and without again reverting to the justice or injustice of the claims presented, and *only pro bono pacis*, offers to pay the said mentioned claims, amounting to $91,727 according to Mr. Clay's account, with the only exception of that relating to the privateer General Armstrong. In respect to this claim, the undersigned cannot deviate from the proposal heretofore made to Mr. Clay, that of so important a claim being submitted to the decision of a third power, the claim being of so different a nature from the others. For as these latter have reference only to Portugal, that of the privateer involves a *principle of national law*, the application of which does not merely regard Portugal, but all other nations."

It is in this letter we find conclusive proof that the obstinacy of Portugal was stimulated and directed by English influence: "Her majesty's government, besides the arguments contained in the notes formerly addressed to the government of the United States, finds its judgment and the manner of weighing the question strengthened with the opinion of her Britannic majesty's government, *which has*

always deemed this claim of the government of the United States as unjust. The subsisting relations between her most faithful majesty's government and that of her Britannic majesty, OBLIGE the undersigned to communicate to the British government all that has taken place," &c., &c.

Now, this question of "National Law" was the liability of Portugal to make good losses occasioned by a force which she was physically unable to resist. It was in relation to this very objection, and after it had been solemnly urged, that Mr. Webster declared, in 1842, that this claim would "not be relinquished." Mr. Clayton had written, on 8th March, 1850 [Doc. 53, p. 68], that, in reference to an arbitration, the President had directed him to say, "that no such course, under the circumstances, would receive his sanction." A sudden change having taken place in our national administration, we find Mr. Webster writing, on 23d August, 1850 [Doc. 53, p. 83], that the President "deems it advisable to accept the proposition offered in the note addressed to you, by the Count de Tojal, on the 6th July last."

What was that proposition? It was evidently one by which, to say the least of it, *our claim was placed at hazard, in order to obtain the payment of others.* The proposition was a complete thing. The United States could only accept it as a whole. There was no admission by Portugal of the justness of the claims she agreed to pay. On the contrary, she denied their justness. The proposition was "*pro bono pacis*," and this consideration would not be secured by the acceptance of the money and the rejection of arbitration, for the greatest disturber of her peace. Upon this point, words might be multiplied, but not argument. The statement of the proposition vindicates itself. [2 Parsons on Contracts, p. 29.]

Our claim thus placed at hazard for governmental purposes, and for considerations in which we had no special interest, we now proceed to the examination of the treaty by which the agreement to arbitrate was provided for.

I do not think it necessary to dwell upon the letters of Captain

Reid, written from New York, the 26th of August, or that of S. C. Reid, Jun., of 5th September, inquiring of the truth of rumors that such an arbitration was contemplated. Their dates show that they were written after the arbitration had become a fixed fact, and so Mr. Webster replies to them. Both of these letters, in respectful terms, question the propriety of the act, and after they had learned that the government was absolutely committed, nothing was left to them but submission.

The treaty having been perfected by the Senate, Mr. Webster, on the 20th March, 1851, writes to Mr. Hadduck [Doc. 53, p. 85], directing him that, in carrying into effect the 3d article of the treaty, he will compare jointly with the Portuguese government the "copies therein specified," and further, he says: "You will understand, of course, that these copies *are limited* to such communications as have passed between the American Legation and the Portuguese government, at Lisbon," &c., &c.

On the 12th July [Doc. 53, p. 86], he writes to him again, and referring to his former communication, he says: "To provide against the omission of any important part of the earlier portion of the correspondence—I mean that which passed in 1814 and 1815, in Rio Janeiro, where the court of Portugal, at that time, resided, *and which it could not have been intended to exclude*—I transmit you herewith a printed copy of the correspondence, as communicated to Congress, on 15th December, 1845."

The erroneous limitation in the former letter is attempted to be remedied by the latter. But before this second letter reached its destination, Mr. Hadduck had already met the Portuguese minister, and compared and certified the evidence to be submitted to the arbitrator. [See Mr. Hadduck's letter, 17th July, 1851. Doc. 53, p. 87.] It may be that the award is to be attributed to an imperfect presentation of the case, and thus vindicate the remark made by Mr. Bayard, in the Senate, that he "finds on the face of the decision the want of a proper presentation of the case," attributable to "a gross neglect on the part of the officer of the government."

The government having thus submitted this case to arbitration without the assent of the claimants, construed the 3d article, which provides, "that copies of all correspondence which has passed, in reference to the claims, &c., shall be laid before the arbiter," &c., as a limitation excluding the right of the claimants to be heard, or in any manner to appear in the case.

Now, we do not admit that the government has a right, under such circumstances, to submit the claim of one of its citizens to the arbitrament of a third power, without holding itself liable to make good the claim, *if it can be shown to be founded in justice.* But waiving this, we contend, *if a case be thus submitted, on the great principles of justice which govern the affairs of nations and men, the parties should have their "day in court," to submit such proofs and arguments as they may deem necessary to the assertion of this right.*

Your honors will, I trust, pardon my reading an extract from Chancellor Walworth, in reference to the binding efficacy of awards: "I apprehend it would be carrying the principle too far to say that the decision shall be conclusive on the party, who has never had a chance to be heard before the arbitrator, upon the subject of the submission." I regard it "as a fundamental rule of construction, in reference to every transaction in the nature of a judicial proceeding, that the contract of submission *necessarily implies that the arbitrator is not authorized or empowered to decide the question in controversy without giving the parties an opportunity to be heard in relation thereto,* unless, by the terms of submission, the right is waived." And the Chancellor quotes Lord Eldon, in a case where an act of sederunt was relied on, as saying, "that by the great principles of eternal justice, which was prior to the act of sederunt, it was impossible that an award could stand where the arbitrator heard the one party, and refused to hear the other." [Elmendorf *vs.* Harris, 23 Wend., 633.] And the same principle has been adjudicated in the Supreme Court of the United States, to which we may now add the admission in the learned solicitor's brief, that "it is not necessary to specify that the arbitrator shall hear and

decide upon the law, and the facts which shall be submitted by the claimants, through their government; *that is implied from the office of arbitrator.*" [Printed brief, p. 5.]

I submit, with unfeigned respect for that great statesman and jurist, who decided upon the construction of this article of the treaty, that there was nothing in its terms which took from the parties the right they claimed under it. But whether this construction was right or wrong, our claim for redress is unaffected, as in the one case, the injury would flow from an executive act, and in the other, from the treaty-making power. In either case, the parties would have been damaged by an act of their government against right and justice.

We come now to the question, "what is the scope and object of the submission?"

To answer this, we must revert to the inquiry, what was claimed on the one hand, and denied on the other?

1. No dispute ever arose as to the *amount of the claim.*

2. The right to indemnity against Portugal was never alleged but on the assumption of the truth of Captain Reid's statement, that he acted in self-defence. [Hopkins to Count Tojal, Doc. 53, p. 22.]

3. Portugal, upon the admission of our premises, denied that any such liability existed under the law of nations. The whole discussion was in the nature of a demurrer which, admitting the facts to be true, denied the conclusion of law. See

Doc. 53, p. 33, Kavanagh,	. .	18th March, 1837
" 34, do.	. . .	4th Sept., 1837
" 36, do.	. . .	6th April, 1837
" 76, Count Tojal,	. .	6th July, 1837

Looking to the correspondence for the purpose of isolating the point of difficulty, and then referring to the language of the 2d article of treaty, I am constrained to the conclusion that the matter referred was the "*question of public law involved in the*

Armstrong case," upon which the parties had not been able "*to come to an agreement.*" This specific question was, whether the weakness of Portugal released her from liability for the damage sustained by the Armstrong, or the illegal proceedings of the British fleet at Fayal. If Portugal had at any time rested her denial of responsibility upon the ground that we were the first aggressors, it would have at once *tendered an issue of fact*, which was capable of easy solution. If this construction be correct, then, upon the plainest principles of municipal and national law, the award not being responsive to, but exceeding the submission, would be void. [Vattel's Law of Nations, p. 276, 277. Wildman, 1 vol., p. 186. Steers and Dashel, 1 Esp. N. P. C., p. 167.]

If, however, this view be erroneous, and the question of fact was submitted by the treaty, then our complaint is stronger of the gross wrong and injustice in submitting this case for adjudication on a question of facts, and depriving the parties of the right to improve the evidence by such further proof as in their opinion their case demanded. It will be remembered that this transaction took place "in the face of all Fayal, and a respectable number of strangers." It was capable of the fullest elucidation. The claimants had presented their claim on their own statement alone, as sufficient for the initiatory action of their own government, but they had never prepared it for final *adjudication* by any tribunal whose judgment was to conclude them. *Could there be a greater wrong committed against their rights, than to force them, in this state of unpreparedness, to an arbitration, which, by its terms, excluded them from all right to be heard?*

If, during the negotiations, the Portuguese ministers had ever rested their denial of liability upon the ground that the proof was not sufficient as to the facts, the claimants could have immediately made good the deficiency, or at any rate brought forward such evidence as was within their power, and upon which they were willing to rely. This contingency was not omitted in the instructions of Mr. Webster, who, writing on the 15th January, 1842, to

Mr. Barrow, says—"If the inadmissibility of the claim is made to depend upon *the defect of evidence*, or upon any other cause, you will ascertain precisely what further evidence is required, in addition to that which has already been communicated by Captain Reid." [Doc. 14, p. 40.]

I conclude this point by repeating—that if the question of national law was alone submitted, then the award, as to the facts, is not of any validity. If the facts as well as the law were submitted, then the still greater wrong has been done to the claimants, by excluding them from the right to prove the facts and vindicate the claim.

The award of Louis Napoleon impliedly admits the liability of Portugal under the law of nations. His language is, "That Captain Reid, not having applied from the beginning for the intervention of the neutral sovereign, &c., '*released that sovereign of the obligation in which he was to afford him protection, by any other means than that of a pacific intervention.*'" Again he says—"that the government of her most faithful majesty cannot be held responsible, &c., '*without the local officers and lieutenants having been required in proper time, and enabled to grant aid and protection to those having the right to the same.*'"

Upon the facts it is considered, that if it be clear that "some English long-boats, under the command of Lieut. Fausset approached the American brig, *it is not certain that the men who manned the boats aforesaid were provided with arms and ammunition.*"

That "it is evident in fact, &c., that the Americans having hailed them, and summoned them to be off immediately, fired upon them, &c., without any attempt having been made on the part of the crew of the boats to *repel at once force by force.*"

It will thus be perceived, that having decided the law in our favor, our claims was rejected.

1st, Because it was uncertain that the boats were armed.

2d, That we did not apply for protection, before we fired upon the boats.

The controlling fact, which must necessarily elucidate the approach to the brig, whether there were more than "one boat," is not found against the claimants. If our statement be correct; and it is not denied by the award, the question must be answered —why did four long-boats of the enemy approach the brig? Again the fact is not denied, that one man was killed and one wounded on board of the brig—but the award states that it was "not certain, that the men who manned the boats were provided with arms and ammunition." How, then, did the loss and injury take place? The only certainty found by the award is that the boats "did not repel at *once* force by force"—without knowing how to measure time as applicable to this phrase; it is evident that if they did return the fire, it was as soon as *they were ready*; and whether this was one minute or nine after they received it, could make no difference in this transaction.

Looking through the whole case, I believe your honors will agree with me in saying, that a just claim on the part of the plaintiffs has been lost to them, and that the loss has been occasioned by the action of their own government, and there now remains only the question, whether this government is bound to make good the loss which it has occasioned?

In the formation of a government, individuals yield up the right to redress their own wrongs. This is submitted to the power which represents the whole society. For the redress of private injuries, municipal laws are ordained; for wrongs committed by a foreign government, the injured party looks to the power of his own sovereign, and to the law of nations. Each citizen owes allegiance to the society, and in return receives from that society its protection. In the language of a learned writer—"In the act of association, by virtue of which, a multitude of men form together a state or nation, each individual has entered into negotiations with all, to promote the general welfare; and all have entered into engagements with each individual to facilitate for him the means of supplying his necessities, and to protect and defend him."

[Vattel, § 16, p. 4.] Again, "whoever uses a citizen ill, indirectly offends the State which is bound to protect the citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation, since otherwise, the citizen would not obtain the great end of civil association, which is safety." [§ 71, p. 116.]

If the government, for any considerations of the general welfare, sacrifices the rights of an individual, the loss should be made good by the means of the whole, and thus equalize the contribution and burden. This is a principle of universal justice, applicable alike to the affairs of government and individuals. Thus, by the Rhodian Law, it is declared that, "if goods are thrown overboard, in order to lighten the ship, the loss incurred, for the sake of all, shall be made good by the contribution of all." Speaking of the right of "eminent domain," the same learned writer on the law of nations says, that when, in a case of necessity, the sovereign disposes of the rights of an individual, "justice requires that the individual be indemnified at the public charge; and if the treasury is not able to bear the expense, all the citizens are bound to contribute to it; for the burdens of the State ought to be supported equally, or in a just proportion." [Sec. 244, p. 112.] This great principle of equality and justice has been incorporated into the stipulations of our Federal and State constitutions, forbidding the government from taking private property for public, and without just compensation.

Upon these fundamental rules, which regulate the relation between government and citizen, the obligation to make good our loss in this transaction rests. We need not rely, however, upon the assertion of general principles, by elementary writers, for the doctrine has been embalmed in judicial decisions. In the case of De Bode *vs.* Regina, the Lord Chancellor asserted, that "*it is admitted law* that, if the subject of a country is spoliated by a foreign government, he is entitled to obtain redress from the foreign government, through the means of his own government. But if, from weakness, timidity, or any other cause, on the part of his own government, no redress

is obtained from the foreigner, then he has a claim against his own country." [House of Lords, 1852. Eng. Law and Eq., vol. xvi., p. 23.] It will be perceived that this general liability is limited by the word "spoliated." To spoliate, is to rob, plunder. So that the redress would not apply to injuries received in legitimate warfare. It was upon this principle that it was insisted in the British Parliament that if British subjects, whose debts and property had been confiscated by the States, during the Revolution, did not receive indemnity under the treaty of 1783, "Great Britain was bound in honor to make them full compensation for their losses." [Debrett's Debates, quoted in vol. iii. Jefferson's Works, p. 373.]

This principle, announced by the highest court in England as a maxim of law, has a wider reach than is necessary to be maintained in the adjudication of the claim now before the court, but no reflection of my own, and no argument or authority adduced, leads me to doubt its entire correctness.

By an examination of our numerous treaties, I find the distinction between acts of war and spoliations fully recognized, as they are also in the admiralty decisions—"*spoliatio sed legalis captio.*" By the 7th article, treaty with Great Britain, 1794, she stipulated to pay for losses and damages by reason of *irregular or illegal captures made during the war.* [Volume of Treaties, p. 121.] So, in the treaty with Spain, 1802, she stipulated to "make compensation for the damages, losses, and injuries, in consequence of *the excesses* committed by Spanish subjects on American citizens during the war." [p. 198.] These may suffice, though we might, to the same point, quote the treaties with France, Denmark, the Two Sicilies, Texas, Mexico, and Peru.

I have examined all our treaties with foreign nations, a list of which, with reference to such articles as bear upon the question before you, I now submit for the convenience of the court. I have found in that examination no parallel to the treaty now before you. This is the first instance that our government has submitted the case of an individual to the arbitrament of a foreign power. So far as

I am informed, it is the first case in the history of nations. Under the Treaty of Peace and Amity, in 1814, we agreed with Great Britain to refer the dispute, as to the Boundary established by the treaty of 1783, to two commissioners; and, in the event of their disagreement, to refer it to "some friendly foreign state." [p. 220.] The commissioners thus appointed having disagreed, the terms of submission were fixed by a convention, 29th Sept., 1827. [p. 362.] Again, a difference having arisen, under the 1st article of the Treaty of Ghent, as to reclamations for slaves carried away by the British, it was, by the convention of 1818 [p. 248], agreed to refer the question to "some friendly sovereign or state. Both of these arbitrations involved mere questions of law, as to the true construction of written instruments. I will ask of your honors an examination of these cases, that you may see with what particularity the right of the parties to a full and free investigation was secured. In the latter case, after the question of law was decided, the claimants, as in all other treaties providing for indemnity, were allowed to go before commissioners, and produce the evidence upon which they asserted their right. I do not understand that government is alone the embodiment of the *power* of the nation, but that it is also the representative of its *justice*. To require, through legislative enactments, that justice be done, and refuse to do justice itself; to teach one thing by its precept and another by its example, would be to confound all morality, and deprive law of all sanction but *force*.

We appeal, then, from the power of the government, by which we have been injured, to its justice, for redress. No question of indemnity or personal safety could have swayed the determination of the gallant Reid and his companions in arms. Without a thought, but for the interest and honor of their country, they freely perilled both, and, with victorious swords, carved out the noblest monument of our naval history. For our defence on land we look, in time of war, to our citizen soldiery. For our safety on the ocean, to our volunteer seamen The Armstrong and Fayal are the watchwords for our future. They are the lights which will lead our gallant tars to

victory. Let them not be dimmed by a denial of that governmental protection to which they are justly entitled.

It may be, may please your honors, that in the zeal of advocacy I may have used expressions and exhibited a feeling not usual in judicial proceedings. If such has been the case, I trust your honors will pardon it for the cause itself; for surely, if there ever was a case in which the cold atmosphere of the court should be warmed with the glow of patriotism, it is the one which, on behalf of the claimants, I now submit for your consideration.

BRIEF OF THE U. S. SOLICITOR.

THE petition asks payment by the United States for the destruction of the brig "General Armstrong" by a British fleet on the 27th September, 1814, at the port of Fayal, in the neutral territory of Portugal. Indemnity was demanded by Portugal of England at the time. Portugal having failed to procure it from England, demand was made on Portugal in 1835. Portugal refusing to pay, although earnestly pressed by the United States, it was finally agreed, by treaty concluded 24th February, and ratified 10th March, 1851, to submit the claim to arbitration. The King of Sweden was suggested by Portugal as the arbitrator, but the United States preferring the President of France, he was agreed upon as the arbitrator. On the 3d of November, 1852, he rendered an award in favor of Portugal, which the United States acknowledged as final and obligatory.

The claim is now urged against the United States, on the ground —1st. That the claim was improperly submitted to arbitration. 2d. That the treaty was so improperly and unskillfully framed, and the arbitration so negligently and improperly managed by the Secretary of State, that the claim was thereby lost before the arbitrator.

In support of this claim, the petitioners, by their counsel, have filed a brief, the points of which, to the number of thirteen, I proceed to state and consider.

First point—Charges that the Portuguese government acknowledged its liability to the United States, and cites the letter of the Marquis d' Aguiar, dated December 23, 1814, and enclosures, in

support of this allegation. (See p. 22, Senate Doc. No. 14, 1st Sess. 29th Cong.)

It is true that the enclosed letter to Lord Strangford, the British minister, charges the British squadron with violating the neutrality of Portugal in destroying the "General Armstrong," and demands an apology and indemnity both for the inhabitants of Fayal, and for the captain, crew, and owners of the "Armstrong," but it does not admit the liability of Portugal in any event.

Second. Every administration has admitted the right of the claimant. The evidence relied on to prove this is supposed to be contained in the letters of instruction of Mr. Monroe, January 3, 1815, p. 20; of Mr. Dickens, dated May 20, 1835, p. 23; Mr. Forsyth, October 2, 1835, p. 27; Do. July 2, 1836, p. 29; Do. September 21, 1836, p. 31; Mr. Webster, January 15, 1842, p. 40; Do. August, 1842, p. 42. Mr. Upshur, who succeeded Mr. Webster, and Mr. Calhoun, who succeeded him, declined action on the claim. Now, with respect to these letters, it will be found that, with the exception of Mr. Webster, none of the secretaries express an opinion on the justice of the claim *against Portugal*—none of them indicate any examination of the claim; and Mr. Webster, at page 4, merely says, he believes "its justness has not been denied," and, at page 42, that the claim is "regarded as just by the government, and will not be relinquished under the objections heretofore made."

The first letter which instructs our minister to demand the indemnity from Portugal is that of Mr. Dickens in 1835. Mr. Monroe looked to Portugal to procure it from Great Britain; and the only expression in any letter prior to 1835, from our officers, which seems to look to Portugal, is to be found in Mr. Sumter's letter of 1st January, 1815, written without instructions from the State Department; and this expression is not *used as a demand*, but occurs in commenting on the lettter of the Marquis d'Aguiar, where he expresses his satisfaction at the "*indication*" it affords "of a resolution *to make* or procure satisfaction to the injured Americans."

And it is to be observed, in reference to this allegation, both with respect to the United States and with respect to Portugal, that it is by no means proper to attempt to conclude them by what has been said by their respective officers on the representations of the claimants, when acting on behalf of the claimant in endeavoring to procure indemnity for them from others.

Thus, with respect, first, to the Portuguese officials: The representations made by the Marquis d'Aguiar in his letter to Lord Strangford, in which he claims indemnity for the Americans on the ground that the British violated the neutrality of Portugal to destroy the American brig, and asserting, in strong terms, that the ground on which Captain Lloyd had justified himself at the time was a false pretence, were afterwards, when the claim was made against Portugal, set up to estop Portugal from denying that the British had been the aggressors; and now, when the effort is made to charge the Government of the United States, the representations made by the Secretary of State and other official persons, in the effort to procure indemnity from Portugal, are set up as admissions of the rights of the claimants; and upon such grounds alone, the advocates of the claim have felt themselves warranted in saying, that the award made by the French emperor was made in total disregard of the facts. But when it is remembered that, at the several times when these representations were made by Portugal and by the United States, they were acting for the claimant and on his representations, and did not undertake to hear testimony and decide the points in advance of undertaking to urge the claim, they are not concluded by them at all when the claimant seeks in turn to make these governments responsible for his losses.

So far from being conclusive evidence, these statements, being nothing in fact but the representations of the claimant himself, are not evidence at all. But these statements, not written by any one having any knowledge of the facts, and altogether on the suggestions of the claimants and for their benefit, are not only sought to be made evidence, but evidence so irresistibly conclusive as to

authorize the inference that the umpire who heard all the testimony committed a gross mistake in respect to the facts.

This conclusion is far from being justified by this or any other testimony which the claimant has offered. Even on the case which the claimant has chosen to present, it is manifest that the decision of the French Emperor was in accordance with the facts and the law. In the protest which Captain Reid made on the 27th September, 1814, at Fayal, he admits that he fired on the boats of the British, on the suspicion that they were approaching his vessel for a hostile purpose—a suspicion he had no right to indulge, and which did not authorize the commencement of hostilities in a neutral port. (See the case of the Anne, 3 Wheat. 435.) When it is considered, too, that the British commander declared at the time that the attack of the Armstrong was made "without the slightest provocation," and "that the neutrality of the port which he had intended to respect had been thereby violated," there is no doubt that the Armstrong was the aggressor. It became so, perhaps, under the honest conviction of the captain, that the approach of the boats from the English squadron was made with a hostile purpose. But that circumstance alone was insufficient to justify him in proceeding to violence. The English squadron had the same rights in the harbor which he had, and might send their boats ashore at night without being subject to questions from him.

And when we have not only the statement of Captain Lloyd, that the boats did not approach the brig with a hostile purpose, and the depositions of the officer in command, and others in the boat, testifying positively that they approached without any hostile purpose, can we hesitate in believing that such was the fact, when not a single circumstance is related by the officers and crew of the brig which conflicts with this statement? It is no doubt true that Captain Reid thought otherwise; but his opinion cannot weigh against testimony not only positive on the point, but entirely unimpeached.

Third. Says prosecution of the claim renewed by Mr. Clayton, and peremptory demand made.

Fourth. That when this was done, Portugal offered to pay all other claims as *a bonus*, if the United States would consent to arbitrate this. This statement is repeated in the sixth point, and will be noticed under that head.

Fifth. That pending this negotiation Portugal made further admissions. That England interfered, and furnished arguments.

The admissions are similar to those already considered. The interference of England was not improper. England was undoubtedly interested in the question. If decided against Portugal, and war was made to enforce it, she would be regarded as the cause of bringing on Portugal, a weak power, the vengeance of a strong one. She maintained that she had not done anything which justified this. The commandant of her fleet against whom the charge was brought repelled it. Could she stand by indifferently, and see Portugal visited with war under such circumstances? On the other hand, could she see Portugal forced to pay, on the assumption that England was the aggressor, without being sensible that the world, under such circumstances, would expect her to reimburse Portugal, and that she would be in honor bound to do so. It is no discredit to England, therefore, that she has openly manifested an interest in the settlement of this question; nor does it show a want of amicable feeling towards the United States, that she desired our Secretary of State to refer it to an arbitrator for settlement.

Sixth. On the death of President Taylor and the accession of Mr. Fillmore as President, with Mr. Webster, the proposition to arbitrate was renewed and accepted, &c. That the payment of the other claims formed any part of the inducement or consideration for the agreement to submit the Armstrong claim to arbitration, is an allegation entirely unsupported by the treaty, or anything in the correspondence or circumstances which led to it.

Seventh. That the private agreement to arbitrate this claim was entered into without the consent of the claimants, and against their protest, &c.

It is true that Mr. Webster did not consult with the claimants

as to what course he should take. He found, on entering office, that his predecessor had proceeded almost to extremities with Portugal in order to extort payment of this claim. Our minister had withdrawn from Lisbon, and notice given to Portugal that the correspondence would be laid before Congress, with the opinion of the President that the claim was withheld upon dishonest pretexts, and ask the action of Congress on the case, which was equivalent to asking the power of compelling payment. He (Mr. W.) did not approve the action of his predecessor. He concurred with Mr. Upshur and Mr. Calhoun (see his letter, p. 54), that there was nothing in the circumstances of the case to justify such a course. What course should Mr. Webster have taken with these convictions? He could not properly proceed in Mr. Clayton's course. He could not suffer the existing relations to continue. He must keep in view the dignity of his Government as well as the rights of the citizen. He could not, as it is now insisted, abandon the pretensions set up by his predecessors, and waive all future discussions of the subject which had brought about a suspension of diplomatic relations to some future time, and so renewed the diplomatic relations. Such a procedure would not have been consistent with the dignity of the Government. It would have been also as full a recognition of the control of the Government-agency by the private citizen, if Mr. Webster had desisted from doing what was proper to be done in his judgment, as if he had proceeded in the designs of his predecessor against his own judgment. When, therefore, the petitioner and his advocates disclaim all right on the part of claimants against foreign governments who have committed their claims to this Government for prosecution, to dictate the measures to be taken, but yet insist upon the right of controlling it so far as to be able to require the Government to drop the claim rather than prosecute it in a way which does not meet the approbation of the claimant, it will be found, upon analyzing this proposition, that it is in fact the assertion, in another form, of the power which is disclaimed.

He did not, therefore, consult with the claimants, when he entered office, as to the course he thought proper to take to re-establish our amicable relations with a foreign government; and the Senate of the United States approved his course by ratifying the treaty. It was peculiarly proper to submit the claim to arbitration. Portugal had not wronged us. This question was one of naked legal liability, with no circumstance for complaint against her. Should the United States have refused to submit such a question to a disinterested power, and used her superior force? But though it is, perhaps, immaterial, the objection that he not only agreed to submit this claim to arbitration without the consent of the claimants, but against their protest, is not sustained by the proof. The proof (see Gov. Marcy's letter), shows, on the contrary, an acquiescence in this course; and a circumstance which is conclusive of this is dwelt on as the principal burden of complaint in the conduct of this business subsequently—that is, the offer of a written argument, to be submitted to the arbitrator.

Eighth.—That this treaty was submitted and ratified 10th March, without any possible knowledge of the circumstances, in proof of which Mr. Webster's letter of 19th March, 1851, to Mr. Hadduck, is cited, and Senate Doc. 7, 1st sess. 33d Congress. Captain Reid had notice of the proposed treaty in September, 1850. He had, therefore, all the time and opportunity necessary to make known his wishes.

The objections to the form of the treaty are frivolous:

1. The 2d article recites, as a reason for submitting *the claim* to arbitration, that the parties could not agree on a question of public law involved in it; *the claim* was to be submitted, not the question of law.

2. The objection, that the claim of the owners was not presented, is not well taken; because, the treaty refers the claim to arbitration as presented by the American Government, which included a claim for the vessel; and the award was pronounced upon a claim relative to the American privateer "General Armstrong."

3. It is not necessary to specify that the arbitrator shall hear

and decide upon the law and the facts which shall be submitted by the claimants through their government—that is implied from the office of arbitrator.

Ninth.—That the Government refused to forward the written argument of the agent of claimants, because there was no provision in the treaty for other argument than that contained in the correspondence. This refusal of the Secretary, and the absence of a provision for argument by the treaty, seems to have been the chief ground relied on by the advocates of the claim in the Senate against the United States. This objection proceeds on the ground that the party was denied a hearing, and it was asserted that it could only have been in consequence of this defect in the treaty, or of the erroneous construction of it, by which a hearing was denied the claimants, that the claim was lost, as the decision was so palpably against the weight of evidence. The misapprehension of the evidence I have already considered. If the court will compare the arguments in behalf of the claim, by Messrs. Hopkins, Clay, and other official personages, which were laid before the President of the French, with that presented by Mr. Reid to Mr. Webster, it will be perceived that nothing was lost in point of argument or good taste by suppressing Mr. Reid's production.

Whilst Mr. Webster's competence for his position is not questioned, it is insisted that by entering into an arrangement by which the facts and arguments developed in this voluminous correspondence were submitted to the arbitrator without further argument, he committed an error so gross as to entitle the citizen to have recourse to Government when the adverse decision was made, because it is insisted that if Mr. Reid's argument had been read by the French President, he would certainly have decided otherwise.

Mr. Bayard, at page 28 of the speeches in the Senate printed by the claimant, says : "In the diplomatic correspondence in reference to the transaction, can the honorable Senator *point out to me any time when the Portuguese government took the ground that in point of fact the first aggression was committed by the General Armstrong?*"

No, sir—no. The attention of our own representatives was never called to such a thing. No such question of fact was ever made; no such investigation of the testimony was necessary, *because the government of Portugal never intended to assume such a ground;* but the Emperor of France, on an unargued case, gets rid of the subject by assuming a matter of fact which the whole testimony goes to deny." (See same remarks, p. 412, Congressional Globe, January 26, 1855.) It is surprising that the honorable Senator to whom Mr. Bayard referred did not point out to him that the Portuguese government had not only insisted that the "General Armstrong" was the aggressor, but had maintained that position in every reply given to our demand upon her to indemnify the claimants, begining with De Castro's answer in 1843, which is the first response made to the demand on Portugal. (See the letter, p. 15, Doc. 53. See also Count Tojal to Mr. Hopkins, p. 33, September 29, 1849. Same to Mr. Clay, p. 49, March 9, 1850. Same, to same, p. 56, April 1850. Same to same, p. 61, May 15, 1850. Same to same, p. 75, July 6, 1850. Mr. Figanière to Mr. Clayton, 27th April, 1850, p. 93. Same to same, July 9, 1850, p. 107.) The replies of Mr. Hopkins and Mr. Clay, to be found in this document, to the letters addressed to them, also show that this position was taken by Portugal, and the argument turns on that point in a great measure. It is therefore a great mistake to suppose, that the French President decided the case on a new and unargued point, started after the correspondence was closed. It will be found also that Mr. Reid's argument, which Mr. Webster refused to send to France, adds nothing to those embraced in the protocol submitted to the Emperor, which, it appears by letter to Mr. Hadduck, included all the correspondence.

Tenth.—That the arbiter chosen was the Prince-President, and before the award was delivered he became Emperor, contrary to the treaty stipulations. The treaty merely stipulated for the reference to the "sovereign potentate or chief of some friendly nation who shall be chosen by the two high contracting parties."

The evidence shows that the award was rendered while Louis

Napoleon was Prince-President, and the minister of the United States was notified of the fact during the presidency. (See Senate Doc. No. 24, 32nd Cong. 2d sess.) The fact that copies of the award were not received till after the Prince-President had assumed a new title, cannot affect the validity of the award, any more than if he had died in the meantime, and the award had been certified by his successor in office.

Eleventh.—Claimants protested when the award was made known to them; but Secretaries Everett and Marcy informed them that it was conclusive.

Twelfth.—The award does not decide any question of public law, and therefore does not comply with the terms of the treaty. (This objection answered under point eight; see also thirteen.) Misstatements in the award, Portuguese arguments adopted, and inference that Portuguese had a hearing when denied to American (require no answer.)

Thirteenth.—Award contradictory. 1. Charges violation of neutrality on both belligerents. (This was true.) 2. Weakness of Portuguese power at Fayal, and Captain Reid's own resort to arms. These are two independent and distinct grounds for exempting Portugal from liability, which are not inconsistent with each other. One, that the local officers were not appealed to in proper time; and the other, that when appealed to, they had not the power to protect the American brig.

The denial, by the claimants, that the first aggression proceeded from the brig, has been considered above. But the fact stated and held to be equally conclusive by the award, that the weakness of the Portuguese garrison at Fayal rendered all armed intervention impossible, is recognized as true by Captain Reid in his protest. (See p. 5, Doc. No. 14.) But whilst the fact is admitted, the law is controverted, and it is maintained that Portugal is bound to indemnify the owners, &c., of the brig, although they were unable to protect her.

This doctrine asserted by Messrs. Hopkins and Clay, and the

claimants, dogmatically, is unsustained by authority. Against it the Portuguese ministers, in the letters above cited, refer to numerous authorities, and maintain their position by great force of argument. (See particularly Mr. Figanière to Mr. Clayton, p. 101, July 9, 1850. See also the speeches of Senators Fessenden, 404–'5, 645; Dawson, 409; Stuart, 403, in Congressional Globe, vol. 30; also the speech of Senator Pearce, of Maryland, in vol. 31, p. 158, and quotations therein from Wheaton's Elements of International Law, directly in point.)

It is contended, also, that the duty of a neutral extends only to the institution and prosecution of proceedings for restoration of the specific property. Captain Reid having set fire to his own vessel, he put it out of the power of Portugal to institute any proceedings for this purpose, or in any way to try judicially the controversy as to the first aggression. (See Wheaton's Elements, pp. 497–'8.)

On their own showing, it is plain that the claimants had no right to indemnity from Portugal.

If it were otherwise, and on the weight of the evidence now submitted, the court should be of opinion that the arbitrator, to whom the evidence on both sides was submitted, had decided against law and evidence, the award is nevertheless conclusive. (Boston Water-power Co. *vs.* Gray, 6 Met. 131.)

Nor would it be less conclusive if the court should be of opinion that the imputations upon Mr. Webster's management of the case were well founded. The doctrine that the government must pay such individual losses as may be supposed to result from the incompetency, negligence, or bad management of officers in the conduct of public affairs, is inadmissible; no such pretension was ever set up before. (See opinion of Attorney-General Cushing, on application of the Peruvian government for indemnity for neglect of duty by marshal of California.) The allegation that the payment of the other claims was a *bonus* for the submission of this to arbitration, is an attempt to show a consideration. But if in point of fact the United States had entered into the arbitration in consideration of

such payment, the payment was to private claimants, and the arbitration was not a release of Reid's claim.

This effort to put this claim on the footing of the claims for French spoilations, is considered and answered by Mr. Benjamin, page 537, Congressional Globe, February, 1855 ; who shows also conclusively, that if every allegation made in support of the claim was fully sustained, it is wholly untenable, and that the allowance of it will be followed by most mischievous consequences.

The act of 1834, donating $10,000 to the captain and crew referred to by Mr. Fessenden and others, shows that Congress has already recognized their gallantry appropriately ; and when it is recollected that the brig was fitted out to carry on privateering as a business speculation, I think that recognition sufficient.

But whether sufficient or not, is not here properly to be considered, as this claim ought to be decided on its legal merits, without regard to the gallantry displayed by the officers and crew of the " General Armstrong " at Fayal.

The heroic commander and his crew are justly entitled to the honor and gratitude of the country, all admit ; but the recital of that honorable claim ought not to be mixed up with the argument on a claim for money dependent on legal considerations, and involving principles which ought to be decided without respect to persons.

M. BLAIR.

TUESDAY, 27th *November*.

MR. BLAIR, the solicitor for the Government, having concluded his argument yesterday,

CHARLES O'CONOR, Esq., for the Claimants, addressed the Court as follows :

MAY IT PLEASE THE COURT,

The claim now presented for adjudication may be placed upon several distinct grounds.

In the first place, we contend that the General Armstrong was employed by her officers and crew in the service of the United States, and against the public enemy, under such circumstances that, on being advised of the facts, and of the great benefit which resulted therefrom to the country, it became the government, as a matter of equity, to adopt the act, and to idemnify the parties against the expense incurred.

Our second general head embraces the following elements. The General Armstrong, whilst lying in the Port of Fayal, was entitled to absolute protection from the Portuguese government. That protection was not afforded; in violation of the neutrality of that port, she was destroyed by the forces of a British squadron; and for this delinquency on the part of Portugal, her owners had a perfect right, by the law of nations, to be fully indemnified. The owners had themselves no legal capacity to prosecute this claim directly; but, on establishing its validity, they were entitled to redress through the action of their own government against that of Portugal. The United States, accordingly, investigated the claim decided in favor of its justice, assumed the control of it, and entered upon the duty of enforcing it. Instead, however, of prosecuting it to an issue by legitimate means, the government receded from its duty in that respect, and actually extinguished the claim, whereby a right has accrued to the owners to demand compensation from the public treasury.

Each step in the argument by which these conclusions are arrived at, seems to us quite clear and intelligible, but the learned Solicitor for the government has advanced a great variety of objections, and it is principally in answering these that we shall engage the time and attention of your Honors.

The absence of precedents has been urged against us, and we have been called upon to produce from the books of the common law, some instance of an action brought, a trial had, and a judgment rendered for the plaintiff upon a claim like the present. We cannot comply with this unreasonable demand; but neither can we admit that our claim should suffer on that account. The nation itself is here a defendant, responding to the claim of a private suitor for reparation of injuries sustained—a thing unparal leled in jurisprudence. The Court itself is the first-born of a new judicial era. Consequently, we cannot hope to find among the narrow rules and practical formulæ which ordinarily govern in determining mere questions of property between citizen and citizen, the lights which are to guide its judgment. As a judicial tribunal, it is not merely new in the instance: it is also new in principle. So far as concerns the power of courts to afford redress, it has heretofore been fundamental that the Sovereign can do no wrong. This court was erected as a practical negative upon that vicious maxim. Henceforth our government repudiates the arrogant assumption, and consents to meet at the bar of enlightened justice every rightful claimant, how lowly soever his condition may be.

Whence is such a tribunal to extract the principles by which its action is to be governed—by which it shall test and allow or disallow the claims which may come before it? In ordinary cases of specific rights declared by some particular statute or regulation, its path may be easy. But in those extraordinary cases which are dependent upon principles not hitherto falling within the judicial authority, which have never been enforced against the State, and which, consequently, courts have never declared in their judgments or illustrated in their opinions, difficulties may be encountered at

the outset. To meet and surmount these, if they exist, is one of the high and responsible duties devolved upon your Honors, as pioneers in this newly opened chapter of juridical science.

Though without exact precedents, you are not wholly without chart or compass. A reference to the origin and growth of jurisprudence, in instances the most analogous, will furnish a sufficient guide.

Rights and their correlative duties are divided into two classes, that is to say, the perfect and the imperfect. The only difference between these classes is in external circumstances—intrinsically or morally there is none. Perfect rights are those which may be enforced by established remedies; perfect duties are those the performance of which may be coerced: a right of imperfect obligation is one for the enforcement of which no remedy is provided. Jurisprudence, as administered by human tribunals, deals only with the means of enforcing rights which are recognized as perfect; but like all moral sciences it is capable of improvement. As the general mind of a nation advances in that freedom which is the result of increased knowledge, the legislative authority will constantly enlarge the sphere of action assigned to jurisprudence, and increase its power of establishing justice. Jurisprudence is only the means, justice is the end. Jurisprudence is of human origin: justice is an attribute of divinity; pre-existent of all created things, eternal and immutable. Its authority is not derived from any human code, either of positive institution or of customary reception; its decrees are found in the voice of God speaking to the heart which faith has purified to receive and reason enlightened with capacity to understand.

When thus aided by the legislature, jurisprudence is enabled to enlarge the circle of perfect rights, by furnishing from time to time, new instrumentalities for enforcing justice. *Est boni judicis ampliare jurisdictionem*, is a sound and unexceptionable maxim; for the exercise of jurisdiction is but giving to men in a practical form, the behests of divine justice, and enforcing their observance. This is well illustrated by the rise and progress of the English law. In

the lofty growth of equity, by the side of its stunted rival, the common law, we see by what means rights founded in justice and conscience, but not yet recognized by positive law, may rise in grade, acquire recognition, and become enforceable by adequate remedies. In that example, this court will find the best lights for its government. In our early law-books, we find it urged, and admitted, that "Every right must have a remedy." But Lord Chief Justice Vaughan stripped this common-place of all its force, by replying "Where there is no remedy there can be no right." The common law judges of England, always acted upon the principle embodied in this remark. From their rigid adherence to it, arose the necessity of a distinct jurisdiction—the power of equity to compel an observance of those duties which conscience enjoined, but which positive law had provided no means of enforcing.

The ordinary courts of law, are not created to declare or enforce justice in the abstract, or justice in general. (See note *a.* to De Bode *vs.* Regina, 13 Queen's Bench R. 387.) Their function is to effectuate such human rights only as, in the existing stage of its progress, jurisprudence is enabled to bring within the sphere of its remedial forms, leaving all others to be sought by entreaty, and yielded by free-will. The judge is obliged to dismiss every claim, however just, for enforcing which he cannot find an appropriate writ in the register; and, consequently, the regret of the Bench and a deep censure upon the defendant, is often expressed in the same breath with a judgment denying the remedy sought.

This was strikingly exemplified in the case of *Jackson* vs. *Bartholomew*, 20 *Johnson's Reports*, 28. An honest farmer seeing his neighbor's wheat-stack on the verge of being consumed by fire in the owner's absence, voluntarily assumed the task of saving it, and did so at a slight cost. Reimbursement being churlishly refused, he brought an action in a justice's court, and the rustic magistrate, not learned enough to know that legal policy sometimes stifles the voice of conscience, decided in favor of the plaintiff. The defendant appealed; and, when reversing the decision on the ground that

for a service, however beneficial, rendered *without a previous request*, no action lay, the Supreme Court of New York denounced the defendant's conduct as "most unworthy." In this censure all honest men must concur. No one could doubt that had the owner of the wheat been present at the moment of peril, he would have requested aid, and promised compensation. An honest man would have conceded this, ratified his neighbor's kind intervention, and promptly repaid his expenditure; but selfishness saw that this was a duty of imperfect obligation, and a callous conscience dishonorably refused to perform it.

The equity jurisdiction of Great Britain has been considered as an anomaly in legal science. Continental jurists seem never to have comprehended it—though it could easily be shown that no civil society ever existed in which there were not some remediable forms of injustice which *Lex non exacte definit sed arbitrio boni viri permittit.* (Story's Eq. Jur. §§ 8. 9.) Institutions which are novel in form, will always excite criticism and opposition, however harmonious they may be, in principle, with what has gone before. But the difficulties which may beset the path of this court, at the outset of its high career, cannot be greater than those which surrounded the early English chancellors in their efforts to mitigate the rigor and supply the imperfections of positive law. They had no judicial precedents to guide them in stilling the waves of contention; the great unwritten law of natural justice, alone governed. They claimed to deal with matters binding in conscience only, and the power to enforce its dictates. At every step they had to contend with the argument now urged against us, that there was no legal remedy, and consequently the law left it optional with the defendant how to demean himself in the premises. As in the present case, the law—the law was dinned into the ears of the court by the advocates of wrong, with loudness and pertinacity; but the clamor was unavailing. Without aid from precedents, but guided by principles, the courts grappled with, and mastered the devices of iniquity. Justice! Equity! Con-

science! words without definition, and incapable of being defined, alone prescribed their jurisdiction, and neither legal or political science had any further connection with the new cases arising before them, than to aid in solving the question how far state policy would admit of right being done to the injured suitor.

To the precise extent which a due regard to public policy would admit, the masters of equity encroached upon the territory of imperfect duties, making firm land wheresoever they trod. Thus, they gradually redeemed from the outlawry to which ignorance or inexpertness had consigned them, a large class of imperfect rights, and enforced a large class of duties before deemed imperfect—because not enforceable—but which were always obligatory in the eyes of God, and were always voluntarily performed by honest men.

Prior to the institution of this Court, *all rights*, as against the nation, were imperfect in the legal sense of the term—every duty of the nation was a duty of imperfect obligation. There was no judicial power capable of declaring either—no private person possessed the means of enforcing the one, or coercing the other. These rights may be deemed still to remain, in one sense, imperfect; for the decrees of this Court cannot be carried into execution by authority of the Court itself. But effectual progress has been made toward giving form and method to the administration of justice between the nation and the individual. This Court enables the latter to obtain an authoritative recognition of his right. No more is needed; for in no case can a State, after such a recognition, withhold payment and yet retain its place in the great family of civilized nations. The ordinary jurisdiction of the Court bears a strong resemblance to the narrow cognizance at common law; but its extraordinary jurisdiction over "all claims which may be referred to it by either house of Congress" extends its power to the utmost limits attainable by juridical science in its fullest development. In this aspect, its dignity and importance as a governmental institution cannot be too highly appreciated. As a means by which rightful claims against the government may be readily established,

and those not founded in justice promptly driven from the portals of Congress, it must exercise a most healthful influence. But we are authorized to look higher than the mere convenience of suitors, and the dispatch of public business. Enlightened patriotism will contemplate other and more important consequences. Caprice can no longer control. Here equity, morality, honor and good conscience must be practically applied to the determination of claims, and the actual authority of these principles over governmental action ascertained, declared and illustrated in permanent and abiding forms. As step by step, in successive decisions, you shall have ascertained the duties of government toward the citizen, fixed their precise limits upon sound principles, and armed the claimant with means of securing their enforcement, a code will grow up, giving effect to many rights not heretofore practically acknowledged. In it will be found enshrined for the admiration of succeeding ages an honorable portraiture of our national morality, and a full vindication of the eulogium recently pronounced upon our people by the highest authority in the parent State. "Jurisprudence," says Lord Campbell, in the *Queen* vs. *Millis*, 10 *Clarke & Finelly*, 777, "is the department of human knowledge to which our brethren in the United States of America have chiefly devoted themselves, and in which they have chiefly excelled."

Whilst we assert that this Court does not stand *super antiquas vias* in anything which concerns mere procedure, and, consequently, that the call for judicial precedents is idle and unreasonable, we admit that cases arising here must be determined in conformity with established principles. It has been truly said, that "you have no power to invent *rights*," but it must be conceded that you have express power to invent *remedies*. The seventh section of the act creating the court provides that you shall prepare to be laid before Congress for enactment, the requisite bill or bills in those cases which shall have received your "favorable decision, in such form as, if enacted, will carry such decision into effect." This, according to Mr. Justice Ashhurst, in *Pasley* vs. *Freeman*, 3 *T. R.*

63, is the precise method of dealing with cases which are without precedent in the known practice of judicial tribunals.

We agree that you have jurisdiction only over that class of cases which are *claims* properly so called. The applicant for bounty must go elsewhere. Grace and favor, if it is ever proper to bestow them, must be bestowed as heretofore, by Congress, without your interference. But claims—claims which would be entitled, as between individuals, to recognition and enforcement according to known principles of law, or upon known principles of equity, are to be vindicated and established by this court. We assert no more than this, except so far as the nature of things may warrant a practical distinction between a sovereign state and an individual. In this way the sphere of equity may, as against the government, admit of some expansion. In a case like that of the wheat-stack, cited from Johnson's Reports, a court constituted as this is, could find no difficulty in enforcing the claim against the government. If a large quantity of public property, or any other great public interest, were, at this moment, in danger of being sacrificed, under circumstances rendering it impossible to apply to the Executive for instructions or for the means of saving it, we insist that a reference of the voluntary salvor's claim would enable this court, as keeper of the nation's conscience, to award remuneration. We say that Government could not, any more than the owner of the wheat-stack, conscientiously withhold compensation in such a case; and that, if the claim should be sent here, this court would be bound to enforce it. State policy may forbid that equity should go so far in a case between individuals as to compel a man to make a request, as it were *nunc pro tunc*. But why may not government ascertain, through a proper judicial investigation, the existence and binding force in equity of a claim upon it, which, in a private case, no honest man would hesitate to acknowledge—which no gentleman could repudiate without dishonor?

When war was declared in 1812, this republic was yet in the infancy of her power. We could scarcely be said to possess either

an army or a navy. Though, in the achievement of our independence we had won high renown, yet physical strength, the only attribute which can enforce respect for the rights of a nation, was not ours to any great extent, and was not imputed to us by any. Our commercial marine had often been plundered with impunity. Even our ships of war had not been exempt from search and impressment. War with France, our early friend, had failed to protect us from insult, and it was in an absolutely necessary defence of our existence as an independent state, that we were compelled to venture upon hostilities with the greatest power of ancient or modern times. The invasion of our neutral rights in navigating the ocean induced the measure, the vindication of them was its immediate aim and object. *Annals of Thirteenth Congress pp.* 1431,—1419 *to* 1427.

Our naval reputation at that time may be judged by the romantic temerity with which the Alert, a pitiful little English gun-boat, in the first month of the war bore down upon the Essex, a 32 gun frigate.

Perhaps we seized upon an opportune moment, for Britain was engaged in an European war which tasked her utmost energies. Even with this advantage on our side, the contest was very unequal ; but, when at length, the gigantic power of Napoleon was prostrated, what was our condition ? The patroness of France under her restored dynasty, the foremost in a holy alliance of all monarchical Christendom, with her thousand ships, and her victorious legions relieved from every other occupation, Britain stood prepared to "crush us at a blow." Such, all will remember, was the language of the times ; and naught seemed to interpose between her resolve and its execution but a brief time—as much as might be needed to conquer intervening space.

Her force was soon felt. The sacred Capitol of our Union—the spot consecrated to liberty by the immortal Washington—fell into the hands of her mercenaries. The thunder of her vauntings was heard along our coasts, and at what vital point her apparently resistless force was next to fall upon us, none could tell.

At that critical juncture (September 9th, 1814) the General Armstrong set sail from New York upon a cruise designed to harass our powerful antagonist. On the seventeenth day out she cast anchor in the neutral port of Fayal, for the purpose of taking in a supply of water. Soon after, on the same day, a British squadron, under the command of Captain Lloyd, consisting of a seventy-four gun ship, a frigate of thirty-eight guns, and a sloop of war carrying eighteen guns, entered that port for the same purpose. Two conflicts took place between the American privateer, and a body of armed men sent in boats from the British fleet to assail her, which terminated in the destruction of the privateer.

This violation of neutrality, and the consequent loss of our property, entitled us to demand compensation as claimants upon the justice of Portugal.

Questions of law have been raised as to this asserted liability of Portugal. These we must dispose of in the first place.

It is said, that Captain Reid, having himself resorted to violence, and struck the first blow, must be deemed the aggressor, however apparent it may have been that such resort was necessary to save his vessel from capture. It is also said, that the obligation of a neutral to make compensation in such cases is not absolute; that if a neutral, at the time and place of the aggression, employs all the means in his power to prevent it, this is all that can be required. Of course, in this connection, it is conceded that if there be negligence in providing, at such time and place, the amount of defensive force which might, under all circumstances, be reasonably required, or if there was a failure in the due and effectual employment of such force, from pusillanimity, gross ignorance, or want of skill on the part of the neutral, responsibility might ensue. What singular questions for discussion between nations would arise in the investigation of these points! In following out to its consequences this idea of limiting national responsibility within the compass of national power, it is said that property unlawfully seized by a third power, within the territory of a neutral, must be restored by the

courts of the latter, in case it should come within their reach; but that when the property is destroyed, or for any other reason cannot be thus subjected to legal process, the neutral is only bound to use his best exertions to procure compensation.

To illustrate what is meant by this employment of his best exertions, it is argued that a neutral is not bound to go to war in such a case; that it would be unreasonable, and, consequently, unjust to require a feeble State to involve itself in hostilities with a powerful aggressor merely for the sake of obtaining justice for the stranger; that friendly negotiation and urgent entreaty for compensation constitute the whole duty of a weak neutral State, whose territory has been unlawfully converted into a theatre of war by a powerful belligerent.

Notwithstanding their palpable absurdity, these doctrines are gravely insisted on. From a perusal of the correspondence between the two governments, it might be thought that some of the able and patriotic negotiators who, from time to time, sought the enforcement of the claim against Portugal, conceded these doctrines; for they condescended, in arguing against them, to discuss the evidence, relying, as they well might, upon its insufficiency to excuse Portugal, even if the rule of law was as contended for. We shall adopt the same line of argument; but we protest, at the outset, against any such inference as against us. We do not acquiesce in any of these doctrines. They are founded in the grossest misconception of public law, and a singular blindness to the plainest dictates of common sense. We proceed to prove this, seeking thereby to establish that —in point of law—our claim was perfectly valid against Portugal, until that government was released by the acquiescence of the United States in Louis Napoleon's award.

England could in no event be held responsible to the United States or to the aggrieved parties. As between belligerents themselves, it is the right of each to make war upon the other, his subjects and property, wheresoever he can find them. "A capture made within neutral waters is, as between enemies, deemed to all

intents and purposes rightful. It is only by the neutral sovereign, that its legal validity can be called in question. The enemy has no rights whatever; and if the neutral omits or declines to interpose a claim, the property (so captured,) is condemnable, *jure belli*, to the captor." "This," (says the Supreme Court in *The Ann*, 3*d Wheaton's R.* 435) "is a clear result of the authorities, and the doctrine rests on well established principles of public law." True it is, that Great Britain was responsible over to Portugal for any sum which she might be obliged to pay—and hence, no doubt, the British influence in procuring Louis Napoleon's award—but that was a question altogether between Portugal and Great Britain. We had no claim whatever against the latter.

It is affirmed, on all hands, that belligerents are bound to abstain from hostilities within neutral territory, and that any violence, except in self-defence, committed by them within such territory is unlawful. It is unlawful as between the neutral and each of the belligerents. The injured belligerent may claim indemnity from the neutral, the neutral may demand reimbursement from the aggressor. We refer to the case last cited, and also to 1 *Wheaton* 405; 4 *Wheaton* 52; *Ibid.* 298.

The rule requiring a total abstinence from hostilities within neutral territory, has, of course, the same limitation which is imposed by reason and necessity in every other case where violence is prohibited. The right of self-defence is rightly called the first law of nature. The arm of the civil magistrate cannot always be extended to prevent injury to the citizen, and when it is not present for his defence, he is not bound to submit unresistingly to death or wounds. When the danger is imminent, and safety cannot otherwise be purchased, the assailed party may always defend himself, repelling force by force. The same authorities which assert that a belligerent forfeits all claim to protection from a neutral sovereign by commencing hostilities within his territory, admit this right of self-defence. And this, let it be noted, is not the privilege of *returning* a blow; that, indeed, is *revenge or retribution* not self-

defence. Self-defence must foresee, anticipate, and defeat the unlawful design whilst only threatened or meditated. Nothing else is defence. Chief Justice Marshall says, in *The Anne*, 3 *Wheaton* 435, that "Whilst lying in neutral waters" a ship is "bound to abstain from all hostilities *except in self-defence.*" Again he says, that no vessel in such waters "*is* bound to *submit to search*, or to account (to the belligerent) for her conduct *or character.*" In a case somewhat analogous to the present, *The Marianna Flora*, 11 *Wheaton*, p 1, Mr. Justice Story says, in reference to defensive force used by the commander of a ship menaced by another, "He acted, in our opinion, with entire legal propriety. He was not bound to fly or to wait until he was crippled. His was not a case of mere remote danger, but of imminent, pressing, and present danger. He had the flag of his country to maintain, and the rights of his cruiser to vindicate." It will be seen, therefore, that Captain Reid's acts in defence of his vessel were lawful; that they involved no breach of duty on his part towards Portugal, and that they in no degree lessened the duty of Portugal to protect him.

What is sometimes called local and temporary allegiance, but is more properly termed obedience, is due to every government from aliens and strangers sojourning within its jurisdiction. The neutral state forbids hostilities within its territories between the armies or navies of belligerents, precisely as the civil magistrate forbids violence between individual enemies. By his laws and regulations, he absolutely supersedes the law of nature, and promises absolute protection in return for obedience. We may admit the truism that neither men nor nations can go further in the performance of their obligations than the employment of their utmost ability. But an obligation like that under consideration is never, in itself, theoretically, nor for any practical purpose, subject to any such limitation. A private man's obligations are no longer enforceable in fact, when his whole means of payment are exhausted; but after that event, he remains charged with the residue of his indebtedness precisely in the same degree as before. Until relieved by death, or released by

bankruptcy, he is still bound to his creditor. Poverty and weakness may plead for indulgence, but neither can rightfully demand a release. The obligation remains. So it is with nations: they must perform their duties or cease to exist. There is no bankrupt act for them; political extinction is their only refuge from the penalties of unredeemed responsibility.

Although some crude remarks of publicists may be found affording a slight pretext for the argument, it cannot be maintained that the duty of a sovereign to afford full protection to the stranger within his gates, whose presence he permits, is anything less than absolute, or that the duty in this respect of a weak nation is any less than that of a strong and powerful one.

When a private individual breaks the peace and does an injury to another, the sovereign power subjects him, by due process of law, to mulcts and penalties. His whole estate, if necessary, is sequestered for the remuneration of the injured party. Precisely the same measure of retribution is to be meted out for the like offence when committed against persons or property, by a foreign nation.

Belligerents are not permitted to fit out ships of war, or augment their force in the ports of a neutral; but all nations allow their ports to be visited by the vessels of those with whom they are in amity, for the purpose of obtaining those necessaries of life which are equally useful in peace or war. Therefore, it was entirely proper for the American privateer and the British squadron, to enter the friendly port of Fayal, as they did, to supply themselves with water. But it was the duty of both to preserve the peace while there, and that duty was enforced to the utmost against the privateer, by the Portuguese authorities. After the first attack upon the General Armstrong, and in anticipation of the second, Captain Reid sought the Governor's permission for thirty of his countrymen, then on shore at Fayal, to come on board and assist in the defence of his vessel. The application was peremptorily refused; and Louis Napoleon in his award, commends, as worthy of all

praise, the act of the Governor in thus effectually preventing an augmentation of the American force. We agree that this was performing precisely, and to the letter, the duty of Portugal towards England. But we insist, however excusable the Governor may have been, from want of power, that the supreme government of Portugal was bound effectively to have prevented hostilities against those who were restrained by its laws from employing their own means of self-defence.

The learned solicitor asserted, that the Portugnese government was not bound to protect strangers, any more than it was bound to protect its own people. Perhaps it was not. It is the duty of every government to protect its own people, and, when violence has been committed upon them, to enforce redress from the wrongdoer to the whole extent of such wrongdoer's ability. The same duty exists to preserve the peace within neutral territory, between belligerent nations. The reason is obvious; the local authority compels the belligerent parties to keep the peace, and it is therefore bound to protect them. This seems to us so plain, so obvious, that no argument is necessary to enforce it. Indeed, the general proposition is not denied; we have only to combat an attempt to fritter it away in practice by subtle distinctions. The *extent* of the liability, upon the part of the neutral power, to furnish compensation from its own treasury, for the losses incurred in consequence of its failure to keep the peace within its territories, is alone disputed. If full reparation is not due to the stranger, what is he entitled to? The attempts to answer this question are ludicrous! It is said that if a vessel is captured in neutral territory, and afterwards comes within the same territory, it should be restored to the original owner; but if it is carried off, and does not return within the neutral territory, then the neutral is not liable. If this is true, then the total destruction of property involves no liability at all, for the neutral cannot deliver up that which has ceased to exist. As violence cannot always be prevented, what is the duty of the neutral in those cases where destruction ensues? The learned solicitor says, the nation whose territory has been

invaded, is to remonstrate with the aggressor; it is to appeal to him in the name of justice, reason, and friendship, to make amends to the injured party. And it is said, if these means fail, the injured party can claim no further redress. Can this be law? The sovereign to whom the application is made, is the unrighteous transgressor; he knows that the reparation sought is for his enemy. He knows also that he has only to refuse, and the obligation of his neutral friend will be satisfied. By a simple refusal, he can close the transaction, and settle the account for ever. If this were really the extent of the neutral liability, the whole notion of a right to indemnity would be the merest farce.

We insist that the obligation of the neutral power is to prevent hostilities, if practicable; and, if that be impracticable, then to make compensation for the injury sustained.

The notion of limiting the duty to prevention or to the employment of such force as may happen to be at the spot for that purpose, is extremely absurd. It can rarely be in the power even of the greatest States to maintain at every point of their territories a force adequate to prevent violations of their neutrality. Indeed, when the force exists, the local officer is not always justifiable in employing it. If the commander of a dozen British seventy-four gun ships, lying in one of our ports, where they had touched for provisions, should seize a Russian ship, refuse to surrender her to the Marshal, and, as Lloyd did at Fayal, threaten, in case of interference with his capture, to bombard the town, and slaughter its inhabitants, would the local authorities be bound to plunge at once into the horrors of irregular war? In most cases the force on the spot would be wholly inadequate to effective resistance. But when it happens otherwise, we doubt the expediency of such a resort. Vastly less mischief would result, in ordinary cases, from leaving the wrong to be redressed by the supreme power. Then, if war should come, it would be met with fitting preparation. The armed warrior, not the women and children of a peaceful town, would encounter its brunt. We deny that the Governor of the Azores

could properly have employed his military force in open war upon the fleet of a powerful nation, which was not only the friend and ally, but, it may be said, the protector of his sovereign. Even if his force had been adequate, the act would have been rash and injudicious. It is quite clear that in such cases the local authorities should most generally submit to the violence, leaving it to the supreme government to apply the proper remedy. And it is equally clear that indemnity is the only remedial justice which can ordinarily be had. If the neutral state has any duty to perform, it is the procurement of such indemnity.

In the obligations which thus rest upon neutrals, there is no difference between strong and weak nations. We commonly say that in the eye of the law all men are equal. So, in international law, all sovereigns are on a perfect equality. Consequently, a state, however feeble, cannot maintain its rank and position in the family of nations, without performing its public duties. When it fails in this respect, it must necessarily fall exactly into the same condition as an individual engaged in trade, who, failing to pay his debts, and to perform the duties of his station, loses all credit and position among his fellow-men. This doctrine is reasonable: no other would be tolerable. A feeble state has at its command a suitable remedy for every such case. When wronged by a powerful nation, it may invoke the reprobation of mankind, by a proper exposition of the act. The force of opinion is great, and nations have been constrained to respect it in the worst of times. If this resort should fail, it may form an equal alliance with other states of its own class, or it may seek the protection of one more powerful. If it can be supposed that none of those means would enable it to redeem its obligations, nothing can be clearer than that it should declare itself bankrupt, and relinquish its pretensions to sovereignty.

To prove that for injuries to property sustained by a belligerent, within the territory of a neutral, from hostilities there unlawfully prosecuted against him by his enemy, the neutral sovereign is only

bound to afford the measure of redress which may be within his ability, your Honors are referred to the text of certain treaties between the United States, England, France, Russia, and Holland. We there find stipulations to the effect that each nation engages to "use its *utmost endeavors* to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken," or to "protect and defend by *all means in its power* the vessels, &c., and restore the same to the right owner." These treaties are relied upon as full evidence of the sense entertained by the great maritime states, as to the extent of the obligations of neutrals in the particular now under consideration. It is claimed that they are not merely strong, but decisive evidence of the *jus gentium*. We admit the proposition in its broadest extent. It only remains, then, to inquire what is meant by the "utmost endeavors" of a nation, or by the employment of "all means in its power." Our government is one party to these treaties. Do we, when promising to use our utmost endeavors and all means in our power, intend to say that we will humbly pray for justice, and earnestly expostulate against injustice? Does this involve a complete exhaustion of all the means in our power? And if, indeed, we are so weak and so degraded as this, is Great Britain—is powerful and martial France, with more than forty millions of warlike subjects—equally so? The small kingdom of Holland is also a party to these treaties. Surely these same words, in the same treaty, do not mean one thing as applied to one party, and a different thing as applied to the other party? We respectfully insist that the rule, as expressed in the text of our writers on international law, and in these treaties, means nothing less than that the neutral state is bound to obtain, or to make, restitution for every outrage committed upon friendly nations within its limits, peacefully, if it can, forcibly, if it must.

A few words in Mr. Wheaton's comment upon these treaties, are thought to favor the doctrine of limited liability now contended for. In Mr. Lawrence's edition of the *Elements of International Law*, p. 497, the author says: "They were not bound to make compen-

sation, if *all the means in their power* were used and failed in their effect." But he does not, by example or otherwise, give the least clue to his notions concerning the means which must be used by the "high contracting parties" in order to fulfill the obligation created by these words. Observing upon the jurisdiction over captures in neutral territory exercised by the Admiralty Courts of the neutral, he says it is "exercised only for the purpose of restoring the specific property, and does not extend to the infliction of vindictive damages, as in ordinary cases of maritime injuries." This sentence is the learned solicitor's leading authority for the position that when the specific property is destroyed, the neutral has no duty to perform. An important distinction, however, exists between the obligations of a sovereign power, which are to be recognized and performed through its executive, and the much more limited field of admiralty jurisdiction. Of course, a Court of Admiralty could neither draw upon the public treasury, nor levy war upon a foreign power. But we can find in Mr. Wheaton's work no evidence that he ever intended to sanction the doctrine that sovereign power can excuse itself from performing the duties of sovereignty on the plea of weakness.

We have been asked whether we mean to insist that Portugal was bound to go to war? We answer, certainly not. Portugal owed us no such obligation. The question, so far as war is concerned, was, whether she owed that measure to herself? Her obligation was to yield us protection, and having failed in that, to indemnify us. Whether she would prosecute a claim against Great Britain by the sword or otherwise, for reimbursement, was altogether her own affair. If she was so weak or so pusillanimous as to waive her rights in this respect, we certainly could not complain. We only say that her high state amongst the powers of earth required her to protect or indemnify us, and forbid her to plead weakness or poverty as a ground of exemption.

The unlimited liability of the neutral in such cases is asserted by the highest authorities on international law. It is asserted in the

published speeches of nearly every legislator who has spoken upon this claim. All our administrations without exception have maintained it. Portugal herself conceded it in 1814, and even Louis Napoleon admits it. He says in his award, that if Captain Reid had not released her by his own conduct, Portugal was under an obligation "to afford him protection *by other means* than peaceful intervention." The original liability of Portugal is therefore manifest, unless Captain Reid, by some misconduct on his own part, forfeited the protection which she owed him. Whether he so misbehaved is a question of fact which we will discuss hereafter.

The next question of law is, whether the enforcement of this claim against Portugal devolved upon the United States as a public duty.

In return for the allegiance claimed by the sovereign, says Mr. Justice Blackstone, the sovereign "is always under an obligation to protect his subjects at all times and in all countries." And that this right of the subject "can never be forfeited by any distance of place or time, but only by misconduct." *Wendell's Blackstone, pp.* 370, 371, and notes.

The Lord Chancellor of England, on the argument of Baron de Bode's case, 16 Eng. L. & Eq. Reports, p. 23, says, "It is admitted law that if the subject of a country is spoliated by a foreign government, he is entitled to obtain redress through the means of his own government. But if from *weakness*, timidity, or other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country."

These are the maxims of monarchy at this day. It was the pride of her, who in ancient times, gave law to men and nations, that in the most distant climes and among the most barbarous people, "I am a Roman citizen," was a certain passport to safety. Shall it be said that our republic yields a less perfect protection to her citizens? We trust not. Mr. Justice Parker, one of the most eminent of American jurists, recognizes the rule that in such cases there rests "an obligation on the government of the United

States to procure redress for its citizens, or itself to reimburse them." *Farnam* vs. *Brooks*; 9 *Pickering's Reports*, 239. On this head there is no lack of precedents. Half the diplomacy of nations has been devoted to obtaining securities for their merchants when subjected in person or property to the jurisdiction of other states: half the treaties on record contain provisions for ascertaining dues, and making compensation on account of past failures in this respect, and all of them abound with mutual pledges of protection for the future. From the Father of his Country to our present Chief Magistrate, no executive has sent to Congress an annual message unmarked with recognitions of this duty. We defy reference to a single instance in which the President has failed annually to apprise Congress of his progress in pending efforts to obtain for our citizens redress of grievances suffered by the acts or omissions of other nations.

The duty of our government in this respect, cannot be denied. It is not denied. The questions are how far did that duty extend? was there any failure in performing it? and, if so, is the government responsible for the consequences?

Responsibility is denied on many grounds.

In the first place, we are told, the government of the United States, in prosecuting claims against foreign powers for redress of grievances suffered by our citizens, is merely the agent of the injured individual; and, assuming as applicable the same rules which obtain in the common law, concerning the private relation of principal and agent, or, more exactly speaking, *master and servant*, it is said that the claimants did not object to the treaty with Portugal, before it was made, or, afterwards, so protest against it, or against the action had under it, as to screen themselves from the imputation of having ratified the act of their servant, by implied consent or acquiescence. It is said the subsequent action of the claimants amounts to acquiescence—acquiescence is assent—assent is ratification, and then comes in this common maxim of servile law, "a subsequent assent is equivalent to an original command."

On the other hand, and with equal confidence, it is asserted that the government is the sole judge what claims of the citizen it will enforce, in what manner, at what time, by what means, and to what extent, it will enforce them. It may, says our learned opponent, relinquish them, submit them to arbitration and to any kind of arbitrament it judges to be expedient in reference to the general interests of the republic; it may accept a compromise, or it may release them without compensation, or for a consideration of benefit or convenience to the public. In fine, its power over the whole subject, is claimed to be absolute in the most comprehensive sense of the word, no responsibility attaching to its action, whatever that action may be.

It is true, that when laying down this latter proposition, the government solicitor became appalled by the enormity of his own doctrine. First, relieving his conscience by an empty admission that it would be wrong, nay, iniquitous, to sacrifice a private right to the public convenience, he endeavored to close this part of the discussion, by asserting that nothing of the kind had ever been done in the whole practice of the government. But feeling, as he reached it, that this assertion begged the very question before the court; he returned like a stout-hearted champion to his starting point, and insisted that the power was vested in our government thus to deal with, traffic in, and for its own benefit, dispose of the private right of the citizen, without any responsibility whatever.

The two heads of exemption from liability thus advanced for the government, are manifestly inconsistent. It must be admitted that they cannot stand together; we hope to show that neither of them is well founded.

How can the government be an agent or mere servant, liable to be restrained by the master's prohibition, or affected by his subsequent censure, and, at the same time, possess absolute discretionary power over the whole subject, free from control, restraint or responsibility? The inconsistency is too glaring.

An individual despoiled by the rapacity, or aggrieved by the

negligence of a foreign power, cannot lawfully wage war, or, in any other form, prosecute directly a claim for indemnity. His only remedy is to invoke the aid of his own government. By a fundamental rule of the social compact, sanctioned by immemorial practice, every community is bound to afford this kind of protection to its members. And when a sovereign state, in the performance of this duty, appears as a prosecutor for redress of injuries, the claimant and respondent are equal in power and dignity. The individual wrong-doer, and the individual sufferer, are alike lost sight of. The responding state cannot avoid liability, by delivering up for sacrifice its agent or subject; neither is the claiming state to be deemed a mere agent of the aggrieved person. It does not act in the name, or by the authority of the injured individual; but in its own name, and right, as ultimate and paramount lord proprietor of all things, and sovereign of all persons, within its jurisdiction. Between these "high contracting," or high contending parties is the suit, and the trial; between them must be the judgment, whether obtained by negotiation, awarded by arbitrament, or won by the sword.—(5, *Howard's U. S. R.*, 397.)

As the respective nations are the parties, and the only known or recognized parties, to the controversy, it necessarily follows that any act of the claiming power which bars its right of farther prosecuting the claim, works an extinguishment of the claim itself—is, in substance and effect, a release to the respondent.

The methods of pursuing such a claim are negotiation, and failing that, war, or, if the respondent will consent, arbitration. In all cases which admit of its application, the latter is a resort favored by wisdom and humanity. When a claim is mutually submitted to arbitrament and determined by the arbiter, that law of honor and good faith which nations must obey (8 *Paige* 534), declares the award to be final, unless a just and defensible cause can be assigned for disregarding it. If, upon its publication, neither party protest against it, the award becomes conclusive, whatever may be its moral or legal vices.

In the present case, a perfectly valid claim against Portugal has been destroyed by the action of the government. We will prove this by the evidence before your Honors. The award of Louis Napoleon stands in our way, and is relied upon as an *estoppel.* In connection with our review of the merits, we hope to show that the award is void as against us; first, for want of jurisdiction; secondly, because the government did not place before the arbiter, but expressly withheld from his view important evidence, which afforded him an opportunity to decide upon facts from his own notions or *ex parte* stories, and sanctioned his availing himself thereof; thirdly, because it refused us permission to be heard before the arbiter, or to present an argument to him; and lastly, because even upon the imperfect proofs presented to him, the award is manifestly partial and unjust.

Pursuant to the treaty with Portugal, by which this claim was to be submitted to the arbitrament of a third power, the Secretary of State, on the 20th of March, 1851, "in accordance," as he states, "with suggestions made by M. de Figaniere" (the minister of Portugal), instructed Mr. Hadduck, our representative at Lisbon, to prepare a protocol, with certain documents annexed, to be authenticated by the respective governments, and laid before the arbiter. The President of the French Republic was first named; and in case he should decline the office, King Oscar, of Sweden, was to be chosen in his place.

This lettter of instructions contains a very singular passage: it is in these words:—"You will understand, of course, that these copies (*i. e.*, the papers to be annexed to the protocol) are *limited* to such communications as have passed between the American legation and the Portuguese government *at Lisbon*, and between this department and the Portuguese legation in Washington." The historical fact, that at the time of the occurrence, and when the proofs in support of the claim were first made up and presented, the Portuguese government was seated, not at Lisbon, but at *Rio Janeiro*, renders it easy to perceive why the Portuguese minister suggested this singular limitation of the proofs to be laid before the

arbiter. His suggestion was craftily made and unwarily adopted Its effect was to carry into the record to be submitted to the arbiter only so much and such parts of the evidence as happened to be incorporated with a renewed correspondence on the subject, which was commenced in 1834, about twenty years subsequently to the occurrence of the outrage for which redress was sought. We will presently show that this instruction caused to be suppressed at least one piece of evidence, which was of great force, and, as we conceive, perfectly conclusive upon the very point of Louis Napoleon's judgment. By the 12th July, 1851, the Department of State was apprised of its mistake; and, in a dispatch of that date to Mr. Hadduck, after calling his attention to the restrictive phraseology used in his previous instructions, Mr. Webster says:— "To provide, however, against the omission of any important part of the earlier portion of the correspondence, I mean that which passed in 1814 and 1815 in Rio Janeiro, where the Court of Portugal at that time resided, *and which it could not have been intended to exclude*, I transmit you herewith" copies, &c.

The latter instructions were issued from the Department of State at Washington, on the 12th July, 1851; but, on the 9th day of the same month, three days previously, the protocol had been completed at Lisbon, signed and sealed by the respective agents of Portugal and of the United States, and forwarded to the arbiter This is expressly stated in Mr. Hadduck's letter to the State Department, dated 17th July, 1851.

If any important part of the evidence was left out by this misadventure in preparing the documents, it must be confessed that the case was not properly prepared. The solicitor has felt the pressure of this circumstance. He could not help feeling it; for we have read from the dispatch of July 12, 1851, an express admission by the Department of its own error. The answer now given to this objection is, that everything material in the prior correspondence was, in some form, repeated in that which was annexed to the protocol. But the fact is otherwise.

Louis Napoleon's award admits expressly, or impliedly, every

proposition of law for which we contend. So far as the law is concerned, it asserts but a single position against us, to wit: that a belligerent who commences hostilities within the territory of a neutral, thereby forfeits all claim to protection, and this we have never denied. The Supreme Court of the United States has often so decided, and we have never set up any pretence to the contrary. *The Anne* 3, *Wheaton's R.* 435. The point of the award is, that Captain Reid and his gallant companions were the first aggressors. It goes upon a mere naked question of fact. How manifestly important, then, was it that the contemporaneous correspondence, and all the testimony taken at the time and bearing on this point, should have been laid before the arbiter.

It seems that Commodore Lloyd, the commander of the British squadron, soon after the transaction, caused to be prepared, and sworn to by Lieutenant Fausset, an affidavit giving the British view of the facts. No full copy of this affidavit was furnished to the arbiter. A portion of it is found in the letter of Mr. James B. Clay, our minister at Lisbon, to Count Tojal, Portuguese Minister of Foreign Affairs, dated November 2d, 1849. That part is manifestly false; but great aid in developing its falsehood would almost necessarily have resulted from a review of its whole contents. Here was a serious failure on the part of our government in its obligation properly to collect and present the proofs.

Immediately after the occurrence at Fayal, the Marquis D'Aguiar, the Portuguese Minister of Foreign Affairs, addressed a letter to Lord Strangford, the Minister Plenipotentiary of Great Britain, resident at the Court of Rio Janeiro, in which he denounced the outrage upon the General Armstrong as an "audacious" and an "unprovoked attack." He also called upon the British government to make "satisfaction and indemnity not only to the subjects of Portugal, but for the American privateer, whose security was guarantied by the safeguard of a neutral port." In the same letter, the Portuguese minister "nails to the counter," as a base falsehood, the pretence of Captain Lloyd, embodied in

Lieutenant Fausset's affidavit, and which Louis Napoleon has sought to consecrate as truth, thereby, as far as in him lay, falsifying American history, and dishonoring the American name.

Thus speaks the Marquis D'Aguiar:—"His Excellency (Lord Strangford) will likewise observe the base attempt of the British commander, at the time he commenced the unprovoked attack on the American privateer, to attribute those violent measures to the breaking of the neutrality on the part of the Americans in the first instance, by repelling the armed barges that were sent for the purpose of reconnoitering that vessel, advocating, with the most manifest duplicity, that they (the Americans) were consequently the aggressors; but what appears still more surprising, is the arrogance with which the British commander threatened to consider the territory of his Royal Highness (the Prince Regent of Portugal) as enemies, should the Governor adopt any measures to prevent them from taking possession of the American privateer, which they subsequently plundered and set on fire."

Some allusions to this letter were, indeed, contained in the correspondence submitted to the arbiter; but no copy of it, or of these important parts of it, was laid before him. This, the learned solicitor tells us, was an unimportant omission, because the Portuguese Minister of State could only judge from the evidence; that his view of it, if erroneous, was not conclusive upon his government, and that Louis Napoleon was bound to exercise an independent judgment on the evidence itself. Admitting, for the sake of the argument, that all the facts were laid before Louis Napoleon (which was not the case), it cannot be maintained that this letter did not contain important matter for his consideration. He had assumed to decide a contested fact of considerable antiquity. The witnesses were not personally produced before him; no truth-eliciting cross-examination could be had, no oral dissection or discussion of the proofs was allowed. Was it an unimportant fact that the defendant in the cause —Portugal herself—had, through her highest authorities, solemnly, and at the very moment of the transaction, acknowledged the

truth of Captain Reid's statement, and stamped as base duplicity and falsehood the story of Captain Lloyd and his lieutenant? Contemporaneous opinion is strong evidence as to ancient facts. When it is considered that this opinion came from our opponent in the cause under arbitrament, and that at the time of pronouncing it Portugal was not only the friend and the ally, but, it may be said, a dependent of Great Britain, its force as evidence cannot be too highly appreciated. If not technically conclusive, who will say that it was not very persuasive?

Here was another grievous failure in the duty of duly presenting the proofs in support of the claim on Portugal.

There was another, and, as we regard it, still a greater failure. It is a very fair presumption that Captain Lloyd conceived the design of seizing the Armstrong for a special purpose. To facilitate aggressions upon our coast and in our rivers, small vessels were greatly needed. The desire to supply this need has always seemed the most probable solution of Lloyd's flagitiously illegal conduct. It so happens that one document included in the Rio Janeiro correspondence, and wholly omitted in the protocol, distinctly proves this motive. Immediately after the principal or midnight combat, William Greaves, the British Consul at Fayal, addressed to the Portuguese Governor of the Azores a letter, in which is found this statement:—"The (British) commander will send a brig from his squadron to fire on the American schooner; and if the said brig should encounter any hostilities from the castle, or your Excellency should *allow the masts to be taken* from that schooner (the General Armstrong), he will regard this island as an enemy of his Britannic Majesty, and will treat the town and castle accordingly."

Lloyd threatened to bombard the town and castle of a friend and ally of his sovereign, in case the authorities should *permit* the Americans to dismantle or destroy their own vessel so as to unfit her for service. Anxiety to save an enemy from suicide, proves some other motive than revenge. The desire to reduce him to captivity and servitude can alone account for it.

All these important proofs having been suppressed, it cannot be said that the claimant's case was fairly tried before Louis Napoleon. According to the recorded admission of that great jurist and statesman, Daniel Webster, contained in his official letter of July 12, 1851, it was submitted in an imperfect and improper manner.

The failure to arrange the proofs properly so called, separately from the mere arguments contained in the correspondence, seems to have misled Louis Napoleon, as to the nature of the submission, or to have furnished him with a pretence for assuming a power which our government could not have intended to confer.

The whole frame of his award implies that in respect to the facts, he did not consider himself bound by the documentary proofs, annexed to the protocol, and that he assumed the power of ascertaining them *aliunde*.

For this purpose, we may fairly presume that he rambled whithersoever he pleased—into British history or into British table-talk. He recites that he proceeded to judgment, "after having caused himself to be correctly and circumstantially informed in regard to the *facts* which have been the cause of the difference, AND after having minutely examined the documents, duly signed in the names of the two parties, which have been submitted to our inspection by the representatives of both powers."

These words certainly imply that he sought proof of the facts elsewhere, and *afterwards examined* the protocol with its attached documents, as an additional or supplemental act. He did not obtain what he calls his correct and circumstantial information, solely and exclusively by a perusal of these papers.

Thus it appears that after having submitted the claim to an arbiter, the government failed in its first duty as *promovent*. It not only omitted to produce the evidence in its power, but expressly withheld it at the instigation of the adverse party. It also furnished the partial umpire with an excuse for assuming powers not granted to him, and not intended to be conferred upon him.

To cap the climax of injustice in the measures by which this claim

was sacrificed, the claimants were refused a hearing before the arbiter, or even the liberty of presenting to him a written argument in support of their claim. This was one of those flagitious violations of justice, against which every honest mind must revolt. To reject without a hearing may be well enough, or between a despot and his bond-slave; it is not within the capacity of a judge. Precedent, authority, reason and sentiment unite in condemning it.

The Supreme Court of Pennsylvania, in *Falconer & Montgomery*, 4 *Dallas' Reports*, 233, says, "The plainest dictates of natural justice, must prescribe to every tribunal, the law that 'no man shall be condemned unheard.' It is not merely an abstract rule or positive right; but it is the result of wise experience, and of a wise attention to the feelings and dispositions of human nature. An artless narrative of facts, a natural and ardent course of reasoning will sometimes have a wonderful effect upon a sound and generous mind; an effect which the cold and minute details of a reporter can neither produce nor supplant. Besides, there is scarcely a piece of written evidence or a sentence of oral testimony, that is not susceptible of some explanation, or exposed to some contradiction. To exclude the party, therefore, from the opportunity of interposing in any of these modes (which the most candid and the most intelligent of disinterested persons may easily overlook), is not only a privation of his right, but an act of injustice to the umpire, whose mind might be materially influenced by such interposition."

The case Sharp *v.* Bickerdike, 3 *Dow's Parliamentary Reports*, 102, arose upon an award made in Scotland. The award was not impeached for any other fault than the neglect of the arbitrator, to hear the parties, under a mistaken belief that he had consented to waive that right. The positive law of Scotland, was, that no award should be set aside, at the instance of either party, for any cause or reason whatever, unless it was for bribery, falsehood or corruption in the arbitrator. Lord Eldon, delivering the judgment of the House of Lords, said, that 'by the great principle of eternal justice, which was prior to all these acts, &c., it was impos-

sible that the award could stand. He added, "Even if he had decidedly *rightly*, he had not decidedly *justly*." In these cases, and in *Elmendorf* v. *Harris*, decided by the court of *dernier* resort, in New York, 23 Wendell, 633—the awards in question, were unanimously set aside upon this principle. Following this line of precedent, the court of Queen's Bench, in the very recent case of *Oswald* v. *Grey*, 29 Eng. Law & Eq. R. 88, annulled an award for this cause, saying, "A more glaring departure from the rules that ought to regulate the proceedings of persons sitting in the character of judges, it is impossible to conceive."

Another and a conclusive objection to this award appears.

As has been before observed, it goes upon a mere question of fact, that is to say, the question whether the Americans on the occasion in question, resorted to force before they were assailed, or subjected to any indignity or peril?

It never could have been the intent of the Executive or the Senate in framing the treaty with Portugal, to submit that question to arbitrament. A total insensibility to national honor, would have been manifested in adopting such a course.

The correspondence between Portugal and the United States shows that the former denied its liability on legal grounds. It was affirmed, on the part of Portugal, that the duty of a state to afford protection to foreigners within its territory was not absolute; that if such state employed the means of protection in its power, it was not responsible for the inefficacy of such means. The absurdity of this position, as applicable to the case in hand, has been already shown, but suffice it to say, in this connection, that Portugal gravely insisted on it. The treaty (Art. 2.) recites, as the cause of the arbitrament, that "The high contracting parties, had not been able to come to an agreement, upon *the question of public law*, involved in the case of the American privateer, General Armstrong, destroyed by British vessels, in the waters of the Island of Fayal, in September, 1814."

This recital proves that the intent was to refer a question of law only, not to refer a question of *fact*. Only two questions of law

can be imagined as arising in the case; first this silly pretence of immunity from the duties of sovereignty, on the ground of weakness, set up by Portugal; and secondly, whether, if the General Armstrong was the first assailant, she had thereby forfeited her claim to protection. The latter point, as we have shown, was well settled in the affirmative by our own courts, and was never disputed by us; consequently, it is plain, that but one question of *law* was in dispute. This question it might have been the part of wisdom to refer, for no third power could ever have decided it against us. Louis Napoleon himself was obliged to determine it in our favor.

Did the Department of State, when preparing the protocol, intend to submit the question of fact to Louis Napoleon? We have shown that the treaty gave it no authority so to do; but we ask whether, through misapprehension of his powers, temporary inadvertence, or from any other cause, Daniel Webster, in the exercise of his high functions as representative of the honor and interests of his country, did really intend to submit to the arbitrament of a third power the question of fact, whether the British or the Americans were the aggressors in the memorable combat of September, 1814, at Fayal? We cannot believe that such an intention existed. We could not admit it without abandoning for ever our deep and unfeigned admiration of that illustrious jurist and statesman. Such an act would have been the extreme of folly. It involved, by an inevitable necessity, the loss of the claim, and what was far worse, a lasting reproach upon our country.

In that midnight conflict, a little American privateer of two hundred and forty tons burthen, carrying seven guns and ninety men, defeated the force of a whole British fleet, killing of her assailants, according to the English historians themselves, within one-sixth as many men as Britain lost in the great naval victory off Cape St. Vincent.

The strength of this comparison will be best exhibited by the facts. In that action there were fifty ships of war engaged, and Britain's immortal Nelson captured the Santissima Trinidada of 136 guns, and three other three-deckers.

Making due allowance for the disparity of the forces engaged, looking with severely exact justice to precise facts, and judging by results, there is not a transaction in the whole history of naval warfare which reflects such signal lustre upon the gallantry of the actors as the defense of the General Armstrong. True, the heroes who perished in the fight had mouldered into dust, and no monument honored their resting-places. Those who survived it had nearly all passed from earth, and the very few yet alive were near the close of their earthly pilgrimage, and were pining in want and penury, sad memorials of that neglect which is proverbially the recompense of public benefactors. But the glory of their achievements was not forgotten. It belonged to the American name: it had irradiated our naval diadem for forty years, and had become a matter of history. Was an American Senate likely to forget its duty toward these recollections? Was Daniel Webster the man to deliver over this bright page in our annals, to be obliterated by the dictum of an European prince?

Honor cannot attend or result from unlawful violence. Unable to deny the physical results, Britain had sought to stigmatize the conduct of Captain Reid as an unprovoked aggression, in breach of Portuguese neutrality, contrary to the law of nations, and deserving only the contempt and abhorrence of mankind. Desperate as may seem the folly of imputing to this little cock-boat aggressiveness against a whole fleet, any resort was preferable to a confession of the facts. Accordingly this pitifully absurd tale was placed upon the records of the British admiralty, and thence transferred to the annals of the royal navy. Britain had sat in judgment on the fact, in her national capacity, and sanctioned this story with her high approval. On the other hand, the government of the United States, in all its departments, and under several successive administrations, had testified its full belief in the statement of Captain Reid. From these sources, the literature of the respective nations had taken opposing opinions. The respective historians of Britain and of the United States stood before the world in direct conflict as to the fact, and were, of course, to descend to future times as rival

claimants of credibility on this question. Its solution involved no matter of mere pecuniary interest, territorial aggrandizement or other worldly profit of any kind; it was a question of national honor or shame.

Did any nation ever submit such a question to the arbitrament of an umpire? To admit it to be a question for trial was to embrace infamy? As well might a high-toned gentleman charged with some scandalous act by a known and avowed enemy, refer the slander to a mutual friend, with authority to decide, upon proofs, whether or not he was a scoundrel. Honor decides such questions for itself, reposes on its own known rectitude for a protection, or vindicates itself by more active means. It never reposes in a trustee, an agent, or an umpire, the power of consigning it to infamy.

One of our reasons for denying that Mr. Webster could ever have intended to refer to Louis Napoleon the question of fact whether the Armstrong was the aggressor, is that the result must necessarily have been against his country and his fellow-citizens.

It is a principle of universal law, that the affirmative must be proven by a preponderance of evidence. Equal *colliding* forces produce a state of rest, as equal weights in the scales produce an equipoise. It follows that whenever the opposing proofs as to a disputed fact are equal, the party who asserts the fact must fail. This, however true in theory, is rarely, if ever, applied in practice. Some circumstance affecting the credit of a witness or of a document produced on the one side or the other, almost always turns the scale; and the verdict or decision goes, accordingly, upon the theory of full credence being given to one side, and denied to the other. Thus, a judicial forum decides between parties, and resolves the doubtful point upon a nice scrutiny of the proofs, responding according to its view of the right, notwithstanding that its decree may possibly wound the honor of one party and his witnesses, by impliedly imputing to them intentional misrepresentation.

Now it so happens, as any one can in a moment see, that if the question of fact as to who was the first aggressor was to be submit-

ted in this case, the United States would hold the affirmative, and the witnesses would be in direct conflict. Consequently a judgment could not be formed in our favor without thus implicating the witnessess of our adversary; whilst, on the other hand, the arbiter could decide against us upon the mere philosophical principle that a perfect balance being produced, it did not become him, as a friend and ally of each, to disbelieve either.

The treaty provided that the submission should be made "to a sovereign potentate or chief of some nation in amity with both the high contracting parties." It was well known that the true party for whom Portugal appeared in the case was Great Britain. Whatever Portugal might be compelled to pay to us, Great Britain would of course, be held to reimburse. But, besides all this—and hence this bitter, long-continued, unyielding opposition to this claim by Portugal, her ally—the honor of Great Britain was deeply involved in the issue. Great Britain, for a wonder, was then "in amity" with the whole civilized world. She was on terms of the closest amity with both the chrysalis royalty of France, and with Oscar of Sweden, the only potentates contemplated by the protocol of submission. The witnesses on our side were private citizens. They had not even an official recognition to connect them with our government, in the technical consideration of an European sovereign, so that discrediting them might be deemed a direct offence to the nation. On the other hand, the opposing witnesses were public officers, servants, and agents of Great Britain. Without taking into view, as additional reasons, or make-weights, toward the same conclusion, the intimate relations for mutual support and protection which exist between the sovereigns of Europe, is it not manifest to the most simple-minded observer, that no one of them, consistently with a prudent regard for his own high interests, could ever assume the office of arbiter upon a matter of fact between two independent sovereign powers, and pronounce a decree stigmatizing the public agents of either as perjured?

It was never denied that Captain Reid fired the first gun.

Primâ facie then, he was the agressor. To justify this, and fix upon the British forces the inception of hostilities, it was necessary to prove affirmatively the menacing approach of an armed enemy. This was an affirmative of the class which it is most difficult to establish by proof. Captain Reid and his men could do no more than swear to it, as they did, and by way of confirmation, affirm the distinct fact, that the fire was returned from the British boats. But the defeated commandant of the assailing force could easily deny this, and he had denied it. Nor was this a case in which, from the nature of the thing, affirmative testimony has a superiority over negative. There was no room for mistake or oversight on the British side. Lieutenant Fausset knew whether his men were armed or not; and he swore they had no arms. Of course, if they had no arms they could not have returned the American fire. In addition to the rule that the affirmative must be proved by a preponderance of testimony, there was a principle in close affinity to it, which any one could see led inevitably to our defeat in the umpirage. As to the hostile intent of the approaching British flotilla, Captain Reid could only act upon circumstances affording a presumption of such intent.

Had he abstained from firing any longer than he did, it is probable that his deck would have been covered with an overwhelming armed force before a blow was struck. Perhaps no wound would ever have been given on either side. Perhaps every privateersman would have been suddenly seized and pinioned by superior numbers, and the gallant little Armstrong, instead of perishing gloriously amid her vanquished enemies, might have been employed to carry rapine and desolation to our defenceless homes and firesides. As it was always admitted that in the first combat Captain Reid repelled the assailing force whilst it yet held no more commanding position than that of menace, proof of an aggressive intent by those in the British boats was indispensable to our success; and the proof on that head could only be circumstantial. On the other hand, Lieutenant Fausset could swear positively that no such

intention existed. He could say Captain Reid was mistaken, and thus, in the most polite style imaginable, entitle himself to the Imperial award.

How hopelessly desperate, then, was the case—treated as a question of fact—considering who was the arbiter and the consequences to result from the decision.

In this connection, we do not question the equal fitness of Louis Napoleon as an arbiter with any other European potentate. It was not to be expected that any sovereign of Europe would convict the British officers of perjury. He could not otherwise conform to the known policy of his class, than by finding, as he did, that the fact was not proved. Consequently it would have been a gross error to submit a fact of this kind to the determination of such an arbiter. He could not afford to act judicially, to scrutinize the evidence fairly, or to determine the fact justly. It would have been not only a grievous error in national policy, but a palpable failure in duty to the country, and to the claimants. No American who regards the honor of his country, will ever admit that the Senate of the United States intended to submit to any earthly arbitrament the question of national honor which Louis Napoleon has assumed to decide. No friend or honest admirer of Daniel Webster will ever admit that he could so far mistake the import of the treaty, as to suppose that he had power to submit it, or that he could be so blind to the dictates of reason and common sense, or so ignorant of the motives of state policy which govern European potentates, as not to see that such submission was equivalent to what lawyers call a *retraxit.* He never could have intended thus to sacrifice at a blow the private interests committed to his charge, and the national honor he so deeply cherished.

If we are right in this, it will be seen that Louis Napoleon's assumed jurisdiction over the fact was an usurpation of power not granted. Upon this ground alone, his award was wholly void in every legal and moral sense, and should have been rejected by our government immediately after its publication.

The tendency to usurpation was pretty strong in the mind of the arbiter at the time, as may be perceived by reference to contemporaneous events. But in reference to this case, he not only assumed powers not granted, but undertook to overrule, and negative the very facts agreed upon by the high contracting parties, and which, of course, he was expressly forbidden to adjudge.

In the second article of the treaty, it is stated in so many words, that the General Armstrong was "destroyed by British vessels in the waters of the island of Fayal." (*Article* 2.) Yet, the award, in reciting this part of the submission, studiously omits the words "by British vessels;" and, in its finding upon the facts, it states, that the act of destruction was by Captain Reid in consequence of the hostile demonstration made. Even if it was within his judicial province to set aside a fact agreed by the parties, he could not justify this finding. The proofs are clear that Captain Reid merely fired a shot through the vessel's bottom, in order to sink her in the harbor, thus placing her for the time beyond the enemy's reach, and reserving the chance of raising her at a future period. But the British, being thus baulked in their original design, set fire to her, and thereby effected her complete destruction.

Thus, it will be seen, that independently of the deeper moral objections *to it*, Louis Napoleon's award was not entitled to any respect whatever, and was wholly void, because he based it upon a question of fact not submitted to him. It may be well, therefore, to state here the legal grounds on which we insist that its acceptance wrought an extinguishment of our claim against Portugal, and gave rise to a claim in its place against the Treasury of the United States. We had, originally, a just claim for indemnity upon Portugal, which, under the circumstances, it was the imperative duty of our government to enforce; and which, as against us, the government had no right to surrender or annul. The power of prosecuting that claim was vested in the government alone, and consequently, the award of Louis Napoleon thereon—whether just and lawful or not—on being accepted by the Department to which

is intrusted our Foreign Affairs, worked a complete extinguishment of the claim as against Portugal. (See Secretary Marcy's letter, dated Dec. 10th, 1854.) That acceptance deprived us of all recourse except upon the public treasury. We claim that the award of Louis Napoleon was partial and unjust ; we have shown that it was void, for want of jurisdiction, because not warranted by the submission, and that it was void as against us, because important evidence was withheld from him, and because the right to be heard in support of our claim before himself or his council, was denied to us.

The withholding of evidence, the denial of a hearing, and the unwarrantable acceptance of the award, are relied upon as involving a liability of the government, because they are not acts of a subordinate official, who might be personally responsible at law to the citizen for the injury produced by his malversation, but are acts of State, performed by the supreme executive in the exercise of a high discretionary authority which no court could control or correct, at the suit of an individual. Hence the liability of the nation.

An opinion of Mr. Attorney-General Cushing has been cited, showing that the government is not responsible for the acts of marshals, collectors, pilots, and other subordinate officers who are appointed to facilitate the business operations of the citizen. We acquiesce unhesitatingly in this opinion. But it has no application to the President, the heads of departments, or other high public functionaries, who are themselves the government. These officers are intrusted with the power of representing the nation and acting for it. They cannot be arraigned in a court of law, or elsewhere made responsible to the private citizen who may be injured by acts of state, performed through their agency. For these the nation itself must answer, in its collective and sovereign capacity. Indeed the Departments constantly recognize this rule. Collectors of the customs are in the daily habit of seizing goods, and performing other acts of direct interference with the property of individuals in

conformity with instructions from the Treasury founded upon a construction of the law which is subsequently condemned by the courts as erroneous ; and, as a necessary result, they are frequently made liable for damages and expenses. On all such occasions, it is the established practice to indemnify the subordinate out of the public treasury. Though selected with especial reference to their fitness for high station, the heads of departments are mortal, and must sometimes err through haste, inadvertence or misconception. When such errors occur, there being no other remedy, it is altogether just that the government should make the reparation. Though the act directed to be done is unlawful, though the direction itself is, of course, a violation of law, still it is impossible to conduct public affairs, at all times, with absolute accuracy, and there must be, somewhere, a discretionary power, to act for the public upon emergencies, and in doubtful cases. When that discretion is rightly exercised, the nation takes the benefit ; when erroneously exercised, it should sustain the resulting loss.

These same principles apply here. Our claim is against the public treasury because the injury complained of resulted from acts of the government itself, performed through its highest functionaries, in the exercise of an irresponsible discretion. The maxim *respondeat superior*, is eminently applicable to such cases. For acts of state, the State itself must answer. The government of the United States did not protest against the award of Louis Napoleon, but, on the contrary, expressly declared its acquiescence through the department of State, and thus released Portugal from all further responsibility. Had the award been rejected, we should now stand in the same attitude which we had occupied for forty years. We would still hold a valid and subsisting claim against Portugal, neither abandoned nor released by our government, and still in due course of prosecution by the proper authority. Although, in such a condition of things, we might well murmur at the delay, perhaps mere delay, even amounting to neglect, would not entitle us to maintain here or elsewhere, a pecuniary demand against the United States.

The right to reject the award of a mutual friend has been exercised by our government, and is fully recognized in the law of nations. Vattel says, that where there is flagrant partiality, or where the arbitrator exceeds his power by determining a matter not submitted to him, it will not bind. "If by a sentence manifestly unjust, and contrary to reason, the arbitrator has stripped himself of his quality, his judgment deserves no attention."—Book 11, ch. 18, § 239.—In the same section, that writer illustrates his views by very opposite instances. He says, "in case of a vague and unlimited submission in which the parties have neither precisely determined what constitutes the subject of the quarrel, nor marked out the limits of their opposite pretensions, it may often happen that the arbitrator may exceed his power and pass judgment on what has not really been submitted for his decision." In this case the submission was framed without the requisite precision as to the point submitted, or Louis Napoleon, without that apology, transcended the authority granted. In either case, the award should have been rejected.

We will now consider the evidence with a view to the question, whether Captain Reid was the aggressor.

James' Naval History of Great Britain, vol. 6, p. 349, states that "Captain Lloyd sent Lieutenant Robert Faussett, in the Plantagenet's pinnace, into the port, to ascertain the force of the schooner (the Armstrong,) and to what nation she belonged. Owing to the strength of the tide, and the circumstance of the schooner getting under weigh, and dropping fast astern, the boat drifted nearer to her than had been intended. The American privateer hailed and desired the boat to keep off, but this was impracticable, owing to the quantity of stern-way on the schooner. The General Armstrong, then opened her fire, before the boat could get out of gun-shot, killed two and wounded seven of her men. As the captain of the American privateer had now broken the neutrality, Captain Lloyd determined to send in and cut out his schooner, &c."

This though not rightfully before Louis Napoleon, if before him

at all, may be regarded as the British version. The historical conflict between us and that nation, may be seen by reference to Ingersoll's history of the second war—vol. 1, pp. 44, 45.

The proof before Louis Napoleon, and now before the court, is found in the affidavit of Faussett, on the British side, and that of Captain Reid, and his officers, on the American side.

Lieutenant Faussett's affidavit tells substantially the same story as that contained in James' work. He says he went to inquire "what armed vessel" it was. He swears that his men were without arms, and that he was in the act of backing his boat astern with a boat-hook, when he was fired into.

Captain Reid in his protest, verified by himself and nine of his officers, at Fayal, September 27, 1814, swears that the first approach to his vessel was made by "four boats filled with armed men, that he repeatedly hailed them and warned them to keep off, which they disregarding, he ordered his men to fire on them, which was done, killing and wounding several men." He further says, "The boats returned the fire, killing one man and wounding the first lieutenant. They then fled to their ships and prepared for a second and more formidable attack."

This is the direct evidence of the immediate actors in the drama.

The absurdity of the English story is very striking. In the first place where was the necessity—what was the right of the British, then in a state of war, to approach an armed cruiser in a neutral port, for the purpose of a search as to her nation or her force? If necessary, could not the first of these particulars have been ascertained with great ease from any officer of the port? No man will contend for the right to make the latter search, and though stated in James' Naval History, the court will perceive that the vague terms employed in Faussett's affidavit, leave it doubtful whether he intends to avow any such design.

The testimony of Captain Reid and his gallant associates, confiicts with Faussett's in every point. First, they say the approach

was made with four boats instead of one. In the next place, they contradict most explicitly the pretence that the British were unarmed, by proving a return fire—effecting the death of one man, and wounding their first lieutenant. About this latter fact, there could be no mistake, and here the collision of testimony is so express, that no decision could possibly be made against the American party, except by convicting them of willful and deliberate perjury, or applying the cold philosophy to which we have before adverted, that is to say, deeming a fact not proven whenever the affirming and denying witnesses have equal means of knowledge. And, indeed, it will be observed that Louis Napoleon must have gone upon this latter doctrine ; for his finding in the award, is simply this—"it is not certain that the men who manned the boats aforesaid, were provided with arms and ammunition."

Many circumstances tend to discredit this English story. Not only the ministry of Portugal, but all Fayal at the time, pronounced the English the assailants. The affidavit of Faussett did not see the light for many years subsequently to the occurrence. In this encounter, the Armstrong lost one killed and one wounded, whilst in her final conflict with twelve or fourteen boats full of armed men, in which such terrible havoc occurred amongst the enemy, she lost only one additional man killed, and six more wounded.

Faussett was obliged, of course, to deny that he approached the first time with more than one boat. Four boat loads of men would be rather a large body to detail on such a service as merely to ask a question; nor was it probable that a British fleet would send out so large a body of men without any arms whatever, to overhaul an unknown armed vessel. He was conscious, also, that the General Armstrong had been fired into with results destructive and fatal. This was witnessed by thousands, and could not be denied; but perverse ingenuity could invent a fable to account for it : so he appended to his narrative the apparently irrelevant circumstance that "Several Portuguese boats, at the time of said unprecedented attack, were going ashore, which, *it seems*, were *said* to be armed."

To be sure, nothing could be less plausible than the conjecture—rather hinted at than hazarded—that these Portuguese boatmen fired into the Armstrong. With that halting indirection which marks his whole narrative, Faussett merely gives this *on dit*, without venturing to assert, even upon report or hearsay, that there was any firing by the Portuguese. He left it to the venal apologist and the partial umpire to deem it "not certain" whether the fire came from the British or the Portuguese.

Surely it is not necessary to dwell further upon this comparison. Faussett is manifestly unworthy of credit, and it appears by the award itself, that Louis Napoleon did not believe him.

The primary fact in dispute was this: Did Faussett approach the Armstrong peacefully and unarmed, in a single small boat, to ask a question, or did he approach with several large boats, thereby displaying and employing such a force as to justify apprehensions of a hostile attack? Louis Napoleon concedes it to be "*clear*," that this first approach to the General Armstrong was by "*some* English long boats, commanded by Lieutenant Robert Faussett of the British Navy." Disbelieving him as to the main and primary fact, what honest court, sitting to determine this case between man and man, could have found, *upon his evidence*, that his crews were not armed, in opposition to the unimpeached oath of Captain Reid and his officers, confirmed by the voice of all indifferent spectators? The whole story is a palpable falsehood. The case is eminently one for the application of the rule *falsus in uno falsus in omnibus*. Any impartial and competent arbitrator would have applied it.

Nothing but Louis Napoleon's total incapacity to sit in judgment on the case, in consequence of his political relations with Great Britain—the party most deeply implicated in the transaction—can account for the award.

Upon reason and authority, the claim against Portugal appears to have been well founded in fact, and valid in law. We had, by the law of nations and the principles of justice, an absolute right to full indemnity from that country. It has been sacrificed, and the remaining question is this: Are we remediless?

Whilst we deny the authority or force of this award, and question the whole course of the government in respect to the reference, we wish to be understood as standing not in the least behind the learned solicitor in our admiration for the character of Daniel Webster. That great man had been just called into the State Department, upon the sudden and wholly unexpected advent of a new administration. General Taylor's warlike spirit, as it was supposed, had brought the country to the verge of a war with Portugal. The civilian who succeeded him preferred peace, and of course his judgment controlled. Acting in harmony with the policy of the new executive, and perhaps without having given to the subject that careful examination which it required, Mr. Webster assented to the reference for the sake of peace. In this way, the rights of the claimants were sacrificed for what was deemed the public weal.

But it is contended that the United States, in prosecuting these claims against foreign powers, acts only as agent for the individuals aggrieved, and that, as principals, we have ratified the act of submission to Louis Napoleon.

We have already denied, *in toto*, the applicability of this doctrine. There can be no implied ratification, because the case is not one of principal and agent. The nation has the whole power: it is the *principal*, not the agent. In defending the rights of the citizen, it is no more an agent than a father is in avenging an insult offered to his child. It acts in vindication of its own honor and sovereignty. But we need not have denied the doctrine, for there is no evidence of ratification.

On the first rumor that an arbitrament was in contemplation, Mr. Sam. C. Reid, Junior, the counsel for the claimants, addressed to the Secretary of State a letter inquiring of its truth, and praying to be heard on the subject before any such action should be had. The gallant old sailor himself who had never known fear of personal danger, shrank with a wisely instinctive horror from the bare thought of submitting his own and his country's honor to the arbitrament of an European despot. The keenness with which he felt upon this sub-

ject is but thinly veiled by the modest courtesy of his respectful remonstrance. Let it be read: it deserves a place in the annals of his country. Let the personal characteristics of the hero, as exhibited in peaceful action, adorn the same page which bears to future times his illustrious deeds. They will alike challenge admiration and reflect honor upon all who may be so happy as to imitate.

NEW YORK, *August* 26, 1850.

HON. DANIEL WEBSTER,

SIR:—By the recent daily journals, rumors are rife that the claims of the General Armstrong, are about to be referred to some power for arbitration. This mode at best being considered somewhat problematical, we, the claimants, would respectfully suggest, whether or not a settlement by treaty or convention may not in your opinion be preferable, as being most likely to enable us to obtain our demands without the risk of a failure?

Feeling as we do, that we are in very safe and very *able* hands, we have no great fears for the future, if we be allowed to compare what you have already done for us, with what is to be expected on future occasions.

After so much negotiation, controversy, and anxiety, for a long series of years, we now look to you, sir, with every confidence for a final and favorable termination of this affair. And should you be pleased to honor us with your views, we shall esteem ourselves under additional obligations.

With great respect, &c.

S. C. REID,
Late Commander of the G. A.
In behalf of the Claimants.

Before either of these letters reached the department of State, the negotiations had been brought to a close, and consequently our government could not recede. This had been done without notice to the claimants, without either knowledge or assent on their part, and was contrary to their wishes.

As it was too late to prevent the arbitrament, the claimants did all that remained in their power. They solicited permission, first that young Mr. Reid, their counsel, might proceed to France, with competent authority to obtain a due advocacy of the case.

This was not granted. They next had prepared a written argument, and prayed that it might be laid before the arbiter. This request was also denied. It seems to have been understood that it was beneath the dignity of a monarch, to hear the party. As an act of State, this refusal may have beeen according to established forms, but, if it was, how manifest becomes our position that the case never should have been referred. Royal grants usually run *Ex certa scientia et mero motu.* This royal arbitrament seems to have been in like manner understood by all parties, except the unsubmitting claimants, as an appeal to absolute, irresponsible monarchical volition!

These rejected solicitations for common justice, and these disregarded remonstrances, constitute the whole evidence relied upon to prove a ratification. If they have that effect, we ask, in the name of conscience and reason, what could the claimants have done in the premises which would not have been a ratification? Was it necessary to levy war against the government? Was it necessary to appear at the State Department and rail at the secretary, like a common scold? Ought we to have hired penny-a-liners, and filled the journals of the day with invective? Surely, none of these things will be pretended. We objected to the policy pursued. When overruled, and no other resource was left to us, we resolved, in humble submission to the omnipotence of the State Department, to make the most of a bad position and to devote every means in our power to the attainment of success.

It may be presumed that our objections to the submission are not relied upon as acts of ratification. Perhaps that point is mainly founded on our prayer to be heard before Louis Napoleon. What else could we have done at that stage of the affair? Silence would have been deemed assent. Any omission on our part to do and suggest whatever was in our power and which could possibly conduce to success, would have been disrespectful toward our government, and might justly have been condemned. Desperate as the case may have seemed to us, it did not appear so to the

government, and surely we were right in straining every nerve to secure success. The spirit which animated our gallant tars in the midnight combat at Fayal, secured neither safety nor entire success; but it inflicted upon the enemy an irreparable wound. It reflected lustre upon our country. The same wise, gallant, persevering, and indomitable spirit, presided over this last effort to sustain a righteous cause sinking under the combined influence of artifice in the enemy, partiality in the judge and oversight in the prosecutors. It did not succeed; but this court will not permit it to prejudice the man who made it. On the contrary, it was on his part a performance of duty. Instead of justifying his condemnation to perpetual silence as a willing participator in this unwise submission, it is precisely the act which secures him still a standing in court, as a claimant, and entitles him this day to ask a judicial sentence against the unjust arbiter. *Judex damnatur cum nocens absolvitur.*

There is something most irrational in the pretence that this prayer for leave to be heard, although rejected, was a ratification by us of all that had been done. A gladiator cast naked and weaponless into the arena, would instinctively call for a sword as the lion approached him. According to our learned adversary's notions of justice, this last prayer of the predestined victim, although cruelly denied, would be an approval of his sentence to the unequal conflict. We dismiss, without further comment, this idlest of all idle pretences.

It has been urged that Captain Reid ought to have surrendered; that he would have suffered no dishonor in yielding without a blow. Suppose it to be so, was there neither merit nor honor in the opposite course? But we cannot agree with the learned solicitor in this. An act of Congress passed at the commencement of the war, directed the President to prepare instructions and to cause a copy to be delivered to the captain of every private armed cruiser.—2 *Statutes at large*, p. 761, § 8. Our copy was lost in the Armstrong; knowing that a line of conduct very different from tame and unresisting submission, was commanded, we have sought

for the original among the archives of the department, but without success. The same remorseless enemy who destroyed the copy at Fayal, at about the same moment, destroyed the original record at this capitol. We cannot therefore, produce it, but we submit that this court should infer the fact. The instructions undoubtedly were to use the utmost exertions to defeat the military and naval forces of the enemy, whenever and wherever encountered. The ninth section of the same act gave a bounty to each person on board, when any privateer burnt, sunk, or destroyed an armed vessel of the enemy of equal force.

Pensions are also allowed by the acts of Congress to every officer, seaman and marine belonging to a privateer, disabled in any engagement, with the armed vessels of the enemy.—*Statutes at large, vol.* 2, p 799, § 2.

This point ought not to have been urged by the counsel for the government. Indeed the fact that it is here urged with a hope of success, considering the ground of the arbiter's decision against us, gives great, and we conceive conclusive force to a distinct equity entitling us to compensation from the public treasury.

The facts and circumstances in proof, show clearly that Captain Lloyd's object was to possess himself of the General Armstrong, for the purpose of employing her against the unprotected villages and hamlets upon our sea-board.

We have shown that the first approach was by many boats, and that the men in them must have been armed. Louis Napoleon admits the former fact; indubitable results make manifest the latter. The letter of Consul Graves proves Lloyd's desire to capture the vessel in an uninjured state, and the first approach as proved by Faussett himself, shows a design to carry her by surprise. His pinnace, as he calls it, when fired into, was immediately alongside of the Armstrong, so near that he employed a boat-hook to direct her motions.

These circumstances are, we say, entirely satisfactory proof of the design imputed.

How great then was the merit of Captain Reid, how deep were

our obligations to him and his gallant companions for having defeated it.

Independently of the right to reimbursement from Portugal, they have a direct claim upon the equity and justice of their country.

When the boats first approached, symptoms of this design, in the judgment of Captain Reid, were manifest. If Captain Reid had preserved a pusillanimous or selfishly pacific demeanor, submitted to capture, and allowed his vessel to become a weapon of offence against his country, the validity of his claim against Portugal never could have been effectually questioned. But he acted on appearances, defeated the design, crippled a whole British fleet, and conducted his operations in a manner at once so judicious and so gallant, that whilst, considering the forces employed, they excel in martial glory and fearful consequences to the enemy, any event of the whole war, every spectator, including even the Portuguese allies of our enemy—many of whom were injured in person and property, during the conflict—justified them as acts of imperiously necessary self-defence, warranted by the great principles of natural and international law, notwithstanding that they were conducted within a neutral territory. His motive could only have been to defeat this pernicious design, his acts could not have been dictated by rashness and temerity, or by any selfish purpose. All the circumstances repel the imputation of rashness; selfishness would have counselled submission to the enemy. He acted on a belief which we can now see was amply justified; he defeated the hostile intent. No mortal can set limits to the benefit which may probably have resulted to these United States, from that defeat.

Yet the very nature of the case rendered proof that that intent actually existed extremely difficult. Counter-evidence must of course be very accessible to the unprincipled assailant. The intent itself was fraudulent and dishonorable. Those engaged in it could not be very conscientious. Falsehood, deception and prevarication, are the invariable allies of fraud. In submitting himself to the government of his well-founded opinion on this point, Captain

Reid performed an act of disinterested devotion to the defence of his country. It was a departure from what the solicitor now calls "the private business speculation in which he was engaged." It was a voluntary act of national defence. By entering upon it, he threw away his certain claim to reimbursement from the Portuguese government, for it exposed him to that very judicial condemnation by which the claim has been sacrificed. Upon any proofs which could ever be produced it might be to a partial arbitrator, nay, to any tribunal quite "*uncertain*" that the hostile and aggressive intent which he anticipated and repelled, had any existence except in his own imagination.

In thus judging and acting, Captain Reid performed a great public benefit He carried on war against the enemy at his own expense, and it was only necessary to satisfy the constituted authorities of his country that the act was a proper one to be ratified and adopted, in order to give him a perfect claim in equity for reimbursement of the cost from the public treasury.

A government at war, always contemplates carrying on hostilities at the public cost by the employment of force against the enemy at such points as may seem most likely to prove effectual. And, although it is true that no citizen is authorized to assume the direction of war measures, yet whenever a private individual, with no motive but the public good, voluntarily avails himself of a favorable opportunity, and bears the brunt of a contest which government would gladly have assumed, could it have foreseen the occasion, we conceive that there arises in his favor an equitable claim to reimbursement.

The principles of enlarged equity and good conscience illustrated by the voluntary service in rescuing the stack of wheat from impending peril mentioned in 20th Johnson's Reports, apply to such cases, and require the government to indemnify the patriotic actors.*

* The point of law here contended for was affirmed by the Commissioners of Claims under the late convention with Great Britain, *in re* The Hudson's Bay Company.—President's Message of Aug. 11, 1856, p. 165. See also opinion of Denio, Ch. J. 3 Kernan's N. Y. Reports, 149.

There is still another distinct head under which our claim should be allowed..

It is asserted by the learned solicitor, and cannot be denied, that the government has entire and absolute control over such claims as that which existed in this case against Portugal, and is alone competent to prosecute them. Of course, we admit this proposition. But whilst we concede the power, we deny that the government has the right deliberately and intentionally to work an inevitable shipwreck, or an express extinction of the private citizens' claim, for its own ease in the administration of public affairs, for the sake of securing the favor, or appeasing the resentment of a foreign power, or for any object or purpose, beneficial only to the public at large, except upon full compensation to the person whose right is thus devoted to the use of the nation. This denial is sustained by the eternal principles of justice. And these principles, so far as they touch this question, do not rest merely upon the authority of reason or even of precedent. They are consecrated as law by the fifth amendment to the Constitution. It provides that "private property shall not be taken for public use without just compensation." No one will pretend that a right to reimbursement for an injury is not property, or that the extinguishment of all remedy for the enforcement of such a right, is not taking away the right from him who possessed it.

This fundamental rule has been violated by the government of the United States, in respect to the claim now before your Honors; and, we insist, that whenever the heel of power tramples in this way upon the interests of a private citizen, a reference of his claim to this court, vests it with the means, and charges upon it the duty of vindicating the right and exacting justice from the conscience of the Republic.

Some further general observations relative to the powers and duty of government in prosecuting against foreign powers claims for redress of grievances suffered by its citizens, may here be proper.

Though its action is representative, and bears a certain analogy to that of an agent, yet, unlike any other agency, its power over the subject is supreme. Whatever the government could do in its legislative capacity it could properly have done in reference to this claim. Undoubtedly, in pursuing demands against foreign states, the government must be the sole judge of the measures to be adopted. It is the judge whether war shall be made, and how long the negotiations shall be permitted to progress before resort shall be had to extreme measures. The interests of particular individuals are not to be preferred to the interests of the whole ; nor are the horrors of war to be rashly invoked. It is also the sole and the competent judge whether the claim actually exists. It has the right to take adequate measures for investigating the facts, and ascertaining not only the existence of the claim, but whether it is of such a nature as to be properly enforceable by governmental agency. This may be done in any tribunal, or by any officer or instrumentality the government may think fit to select. This is manifestly so, because in the nature of things the government cannot otherwise act intelligently. As a consequence, we must concede that when the official inquiry thus instituted results adversely to the claim, the suitor is obliged to submit. Even though his claim be just, he must relinquish its prosecution. In such a case he is in no worse plight than the owner of any other righteous demand, who, from want of evidence or other accident, has failed to persuade a court and jury of its justice or legality.

Even when a claim has been found upon due examination to be just, we concede that the suitor must submit to such delay in the prosecution of it as the exigencies of public affairs may occasion ; nor is there any greater right to complain of delays than belong to suitors in our ordinary courts of justice. Much time is often required to carry these cases through, and consequently mere delay cannot be considered a neglect of duty.

Questions of more difficulty may arise in respect to the powers of government to compromise a claim which it has pronounced to

be just. For instance, whether in consideration of some special circumstances government would be authorized, in a class of cases, to accept as in full, a portion of the sum due? Perhaps there are grounds which might justify the exercise of such a discretion. We do not mean to deny or dispute it, because the inquiry is altogether irrelevant to this case.

It has been contended that when prosecuting claims against a foreign State, government has a right to discriminate between those equally meritorious, to prosecute some and abandon others. Perhaps this may be so. But there is an universally received notion of justice which forbids such a course. The learned solicitor, may, if he pleases, pronounce it a vulgar prejudice—certainly its condemnation is usually expressed in a somewhat vulgar form of speech. It is called "making fish of one, and flesh of another." Even in matters of gift or courtesy it is disapproved. Equality is approved by the universal sense of mankind—in the distribution of alms, the bestowal of complimentary gifts, and the tender of courtesy, as well as in the administration of justice. When a parent's testament discriminates between his children, it often leaves a "plague-spot" upon the testator's memory, and lights the baleful fires of hatred amongst his posterity. How far a simple discrimination between claims of precisely equal merit might be competent, need not be determined. No such case is before the court This claim was never thus simply discriminated against and abandoned. We will consider hereafter what may be the just result of that which did take place, that is to say, an abandonment of it by the government for a valuable consideration received by the public.

The right of the government as prosecutor of claims for the spoliation of its citizens, to discriminate, to a certain extent, between *classes* of claims, might safely be conceded, and perhaps could not be denied. For instance, in negotiating with a foreign state, all claims existing prior to a certain date, or to some public event, might perhaps, be deferred; all claims constituting a class, and, as such,

falling within certain principles apparently detracting from their merit might perhaps be relinquished. This line of action would not always involve a manifest violation of the rule that, government should afford equal protection, and extend equal benefits to all beneath its sway. In imposing taxes, and other burdens, the legislative power often selects certain classes. Particular trades or occupations hitherto lawful may, by an exercise of legislative discretion, be adjudged to be prejudicial to the public interest, and henceforth prohibited or restrained within new and more confined limits. The legislative power decrees that only males between certain ages shall be sent to bare their bosoms to the enemy, and ward off his assaults, thus exempting all others from milltary duty. Inequalities in administration like these which go upon some reason, wisely or not, assumed to be just, have not the impress of unfairness and favoritism. We need not in this case deny their lawfulness. But whilst we concede to the government, in its legislative action, and in its executive administration, this right of discriminating between large classes of cases or persons, in the imposition of burthens and the granting or withholding of privileges, we deny its right to single out for sacrifice, a single individual, or one particular claim. Such an act is repugnant to the general sense of mankind; and, if it be designed for the public interest, is forbidden by the Constitution, unless upon full compensation made from the public treasury.

In the first place the government investigated the merits of this claim, and determined that it was valid. It was in the power of the government on obtaining new lights to have revoked this decision, but it never has done so. It never can do so, the facts forbid it. As *parens patriæ*, it assumed the duty of enforcing against Portugal, this claim, together with several others of equal, but not of greater validity. Negotiations were commenced accordingly, and after many years they reached a conclusion. The ultimatum of Portugal was, that although she denied the justice of all the claims, yet, for the sake of peace, she would recede from her opposition to all

the others, and would pay them in full, provided our government would refer this one to arbitration. Whether she could be driven from this position by any thing less than actual compulsion, was to some extent tested by General Taylor's administration. The United States could not separate the several parts of the offer; they were obliged to accept it or reject it *in toto*. 2 *Sandford's Chancery Reports*, 244. Mr. Clay, our minister, by authority of his government, rejected it, demanded his passports, and sailed from the Tagus.

At this critical moment in the history of our claim, the heroic head of our government was summoned from mortal to immortal life. His more cool successor, armed with a higher degree of prudence, shrunk from the responsibilities of a war with that nation which had been pleading her own weakness and incapacity for half a century. He at once relinquished the high ground taken by his predecessor, and accepted the offer of Portugal.

The treaty thereupon made, singled out the case of the General Armstrong, for umpirage, and the other claims were paid accordingly.

We do not deny that our government might fairly have submitted any mere question of law involved in the case even to a third power, since on that part of the case error seems to have been impossible. Perhaps we could not complain of an investigation of the facts by a jury or by any responsible and impartial individuals. But inasmuch as, from the outset, it was plainly manifest to the commonest understanding, that a reference of the claim, as a question of fact, or as a mixed question of law and fact, to any potentate of Europe, necessarily involved its rejection, we insist that this treaty, taken in connection with the subsequent unwarrantable acquiescence of our government in Louis Napoleon's award, was a sacrifice of the claim for the sake of accomplishing ends deemed to be important to the public, that is to say, the recovery of other claims, and the restoration of amity with Portugal. If we are mistaken in the views which have been expressed to the con-

trary, and the treaty did, indeed, contemplate a submission of the facts, our point is only made the more brief and direct. Then the treaty itself was a substantial surrender of our claim. All that followed was "leather or prunella," the mere ceremonial of the release. Louis Napoleon was the scrivener, chosen by the high contracting parties, to select the phrase and apply the forms required for a solemn authentication of their preconceived design. We do not mean that, in a common and vulgar sense, our government designed this relinquishment, but it is sound law and conformable to reason, that parties are always held to intend the necessary result of their acts. Portugal saw that arbitration and release were practical synonyms; the claimants saw it and remonstrated against the measure; our government ought to have seen it, was bound to have seen it, and must therefore be adjudged to have seen it.

Thus we establish our point that this claim being private property, was devoted to destruction for purposes of State, which fact, by the Constitution and by the elementary principles of general justice, entitles the owners to compensation from the public treasury.

The great antiquity of this claim has been urged against it. That is certainly not the fault of the claimants. They presented it in their protest on the very day the General Armstrong was destroyed; they have patiently but respectfully pressed it by every means in their power from that day to the present. If it has been neglected by the government which alone had the means of enforcing it, that fact, so far from being an objection to the claim as now presented to this court, is the very basis on which it rests.

The learned solicitor, however, thinks he has produced some thing in the shape of authority against us. He says the claim has been thrice rejected. He has not pointed to the evidence of these rejections, nor to that place in the history of the case where we may find them recorded; consequently we are left to conjecture what are the acts which he calls rejections and we can only invite

attention to the circumstances upon which he may be supposed to rely.

The first of these rejections took place in 1817. It is found in the report of a Senate committee upon the memorial of the owners of the General Armstrong. Perhaps that report was right in saying that the owners were not, at that time, or, upon the grounds set forth by by them, entitled to payment from the public treasury. But that very report declared "that indemnity from Portugal ought to be insisted on as an affair of State." This is rejection the first! Is it not an express recognition of all that we now assert?

In 1846 the claim was again presented to Congress, in consequence of its not having been followed up against Portugal by Mr. Upshur, or perhaps, as has been suggested, by Mr. Upshur's clerk, and in consequence of its having been treated in like manner by Mr. Calhoun, who, it is said, acted through the very same irresponsible agency. It was then referred to the committee of the Senate on foreign affairs, who, in their report, after reviewing the circumstances of the case, advised a polite reference of the case to the State Department to be proceeded with against Portugal, according to the recommendations of the report made in 1817. This report was adopted by the Senate. For some undiscoverable reason, however, the department failed to act until 1849, when Mr. Secretary Clayton took the matter up, and prosecuted it with vigor, and to the very verge, it has been said, of a war with Portugal. This is rejection the second!

We now proceed to the third rejection. After the delivery of of Louis Napoleon's award, two distinct petitions were presented, one to each house of Congress for the allowance of the claim in its present form. And what were the results? In the House of Representatives, a report of the most favorable kind was made. "It says that a stronger case for relief in equity could scarcely have been presented." The House not having sufficient time to take up the claim, referred it to this court. Surely that was not a rejection!

In the Senate an equally favorable report was unanimously pre-

sented by the Committee on Foreign Affairs. That committee was composed of men not unknown to fame, most of whom have borne a conspicuous part in the legislation of the country, and all of whom may be supposed to have understood pretty well the principles of justice and also what was due to the honor of their country.

A bill was accordingly brought into the Senate for the relief of the claimants. The fate of that bill is the only thing bearing any resemblance to a rejection which has ever occured in the history of this claim ; and, therefore, it may be proper to state somewhat in detail the action of the Senate. It is appealed to as evidence against the justice of our claim, and therefore, it is certainly proper to scrutinize it somewhat carefully, in order to ascertain whether it amounts to a rejection. The bill was presented and, without much examination, was lost by a vote of 12 to 21 ; a reconsideration took place, and by a vote of 22 to 17 it was ordered to its third reading. This is generally regarded as a test vote ; but scruples were indulged in, another reconsideration took place, and finally at the close of the session, after a very animated debate—a full report of which is presented to your Honors—the bill was laid upon the table by a single vote. This is not a rejection, it is something like the put-off of a polite, but evasive debtor, "Call again to-morrow." The whole technical force of such a vote is to postpone the consideration of a measure for the session. Its moral weight, in this instance, deserves a passing notice. It was 25 to 24, consequently this lean majority—one single legislator—constitutes the whole length, the whole breadth, and the whole strength of the three alleged rejections.

The claim was once allowed by a strong vote, and the utmost that can be alleged against it is, that it was once indefinitely postponed by a majority consisting of one single vote. It is true, the claimants have been delayed and postponed ; they have been turned over to Portugal for redress, and sent muzzled and fettered to the footstool of Louis Napoleon for justice ; but their merit has never been denied. Every congressional report upon the sub-

ject, and they amount to four in number, covering a period of nearly forty years, is in their favor.

Captain Reid has been reproached with sordid motives in mingling with the glorious history of his achievement the acceptance of a pecuniary recompense. Is it dishonorable in the war-worn veteran, to accept from the overflowing treasury of his happy and prosperous country, the means of subsistence in his old age, and of decent sepulture when his hour of parting shall arrive? Surely not. The learned solicitor accompanied his lecture on this head, with a reference to the example of him whose deeds and memory are deemed the best illustrations of all that is heroic in patriotism, and exalted in honor and moral rectitude. Though Captain Reid presumes not to challenge a comparison, we must say that this allusion of the learned solicitor was most unfortunate. Though there be no comparison, neither is there in this particular, any contrast. Though Washington never descended to the grade of a hireling, and persisted to the last in refusing compensation, though he did not even accept reimbursement of his personal expenses from our impoverished treasury during the conflict; yet it is one of the recorded proofs of his practical wisdom, of his freedom from mere sentimentality, and of his precision and exactitude in the details of duty, that when his country had achieved her independence, and was able and willing to do justice, he rendered in his own hand-writing, a minute statement of his expenses in the public service, and received from Congress a full pecuniary indemnity. This parallel, which but for the learned solicitor's introduction of it, we would not have ventured to exhibit, refutes another of his arguments. He says that all claims allowed by government ought to be founded in some prescribed rule of law. Washington declined that very payment for his time and services which the law allowed, and accepted the indemnity which no known law directly sanctioned; but which, being due on principles of natural justice, was conceded by the enlightened equity of Congress and the gratitude of his country.

Captain Reid asks no gratuity; he asks neither pay nor reward

for his personal toil, sufferings or achievements. Simple indemnity for the actual pecuniary losses of himself and his brave companions, is all that he seeks for himself or them.

Here and elsewhere, it has been again and again urged that the allowance of this claim would be bad policy and "a dangerous precedent."

Paying a just indemnity for such losses, it is said, would lead to numerous claims of the kind. When claims are not founded on meritorious services, they can be rejected. But we cannot see that any mischief will result to our country or its interests from allowing indemnity for the cost of achievements in war, so signal in themselves and so beneficial in their consequences as that now under review. May such "precedents" never be wanting. They must ever redound to the profit and honor of our country, and can never prove dangerous, except to our enemies.

It is said, if we repudiate the award of Louis Napoleon, it will disturb our amicable relations with France and prevent European potentates from ever acting as umpires for us. France cannot easily make a national quarrel out of our awarding compensation to our gallant tars for doing their duty. And if the effect of your decision should be to deter, for all future time, American statesmen from submitting to the arbitrary determination of an European potentate, without evidence and without argument, questions of fact involving our national honor, so much the better. If it shall also deter European rulers from ever again assuming the decision of such questions, it will render them an important service. He who is by position and circumstances disqualified from exercising an impartial judgment, sins against his best interests and his own honor in assuming the office of judge.

The award is founded in error. It seeks to falsify American history, to fix a stigma upon our national character, and, at our expense, to rescue our enemy from merited opprobrium. Unless by some competent authority repudiated upon our part, we must be deemed, through all future time, as having subscribed to its truth and our own dishonor. Instead of allowing it to seem thus acqui-

esced in, this court, as it may do consistently with truth and justice, ought to stamp upon the page of history its indignant reprobation of both the reference and the award.

Let it not be said that posterity will prefer to the judgment of this court, the award of the impartial referee. In what degree he was impartial may be gathered from the facts. He assumed powers not granted. He gave credit to the denial of a witness whose positive assertion he discredited and solemnly found to be untrue. At the very time of forming his award he was secretly progressing in negotiations for an alliance with Great Britain, the nation chiefly interested against us in the controversy. The importance of that alliance, and the necessity of securing it, may be judged by the stupendous objects it had in view, and is now struggling to accomplish. Neither will it be overlooked that he was chosen to arbitrate as President of the Republic of France, and that, when preparing the award, he was actively engaged in undermining the foundations of that government which, as chief magistrate, he was pledged to maintain. Though the reference was to a President, the award came from a king. With the hand which signed it, he had just stricken down the liberties of his country; that hand was yet reeking with the life-blood of a republican constitution.

No wonder that to gratify a monarchical ally, he readily sacrificed the rights of a republic.

You have been asked to forbear from scrutinizing too nicely the justice of this award, from considerations of deference to the chief of a sovereign State now in amity with us. We ask you to scrutinize it closely, to judge it fearlessly, and, as becomes an American tribunal, to discard considerations of policy when justice and national renown are involved. If the arbiter were all that his most obsequious admirers would venture to assert, his merits have been sufficiently acknowledged and amply rewarded. The liberties of one republic have been sacrificed to his ambition, let us not immolate the fame of another upon the same unholy altar.

POINTS DECIDED BY THE COURT.

OF THE RIGHTS AND OBLIGATIONS OF NEUTRALS.

Any violation of the neutrality of a port, by either of two belligerents, is a breach of the law of nations.

The property of belligerents when within neutral jurisdiction is inviolable.

It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution.

Where a party attacked, merely exercises the right of self-defence, it cannot be a cause of complaint; the breach rests with the party violating the rights of the neutral by attacking the other.

The act of sending out boats to effect a capture, is in itself a direct act of hostility, in violation of the law of nations. No measure is to be taken that will lead to immediate violence.

Where an enemy's vessel is approached by the boats of a belligerent, in a neutral port, with an evident hostile intention, the right of self-defence, and law, and reason, justify the enemy in firing upon the boats, which had been hailed and warned to keep off. The fact that the enemy fired the first shot, does not constitute them the aggressors.

Where a neutral power permits an enemy's vessel to be attacked and destroyed, while under neutral protection, the neutral is bound to make pecuniary compensation for the damages sustained by the injured party

Where the Governor of a neutral Territory remonstrated against the hostile aggressions being committed upon an enemy's property, but did not use all the means in his power to protect it, the neutral will not be released from liability.

The weakness of a nation, or the want of ability to protect her neutrality will not relieve her from the obligation to make compensation for property destroyed in the neutral territory.

OF ARBITRATION—LIABILITY OF THE GOVERNMENT.

The right of the government to submit a claim upon a foreign nation, involving the interests of its citizens, to arbitration, is not denied, but it must be done with a due regard to the rights of the citizen.

Where the government submits such a case to arbitration, in which the rights of the citizen are disregarded and sacrificed, the government is bound in justice to make him restitution.

To relieve the government from liability to its citizen on this account, it must appear that the case was one proper to be submitted; that he had an opportunity of being heard before the arbitrator by argument and proofs; that the award was certain, definite, and within the submission; and that the arbitration did not exceed his powers.

Where the government has universally acknowledged a claim of its citizens against a foreign nation, upon overwhelming evidence, and had always asserted that the foreign nation was bound to redress the injury; when it had resorted to argument, and finally, asserted its fixed determination that the foreign nation *must* redress its citizens, it has no right to hazard the claim by afterwards submitting it to the arbitration of a third power. Such a case is not proper for submission.

Where a case is thus submitted, without the assent of the claimants, and against their wishes, the government assumes the responsibility, and becomes liable to the claimants.

Where the government by a treaty with a foreign nation, agrees to accept the payment of certain claims, *pro bono pacis*, with the condition that a certain special claim of its citizens shall be arbitrated, it is not released from responsibility to its own citizens, in case the award is unfavorable.

Where the government submits a claim of a citizen to arbitration without his assent, it should provide that he shall be fully and fairly heard, and have all reasonable opportunity to lay before the arbitrator the evidence on which he relies.

Where the government refused to sanction in any manner the presentment of a case by the claimants to the arbitrator, under the construction of a treaty, it will be in violation of the plainest principles of justice, and for such a wrong at the hands of the government, reparation should be made.

OF THE AWARD AND ITS VALIDITY.

An award made without the party having had an opportunity to be heard, rests neither upon law nor justice. Every party should have an opportunity to be heard before the tribunal that is to pass judgment on his rights.

Where, by the terms of a treaty, the matter submitted was *a question of law*, and the award of the arbitrator was solely founded upon *the facts held*, that the award is void, because it does not settle the matter in dispute, and

the matter submitted; because it *does* settle the question of fact, which was not submitted, and therefore exceeds the submission.

Where an award is binding against the government, which by its own acts had disregarded and sacrificed the just rights of its citizens, it is bound to make compensation for the neglect of its duty in not affording them protection.

March 17th, 1856.

Chief Justice Gilchrist delivered the opinion of the Court.

This case has been pending before the people and government of the United States, in various forms, for more than forty-one years. It has never, until recently, been in a situation to be thoroughly argued and investigated as a question of law and of fact; although, from the peculiar circumstances attending it, and from the discussions in Congress, it has commanded the attention and excited the interest of the public. We are now to consider it, however, in its relation to individual rights and national liabilities, and in this point of view it requires a careful consideration.

The case is an interesting one in a national point of view, not only because it relates to the duties of neutral nations towards belligerents, but because it raises the question, how far a belligerent power is liable to its citizens for losses they have sustained through the neglect of their government to insist that the neutral nation shall perform its obligations. It is also interesting as a brilliant illustration of the gallantry and self-devotion of our countrymen.

The leading facts in the case have been notorious to the American people for more than forty years. On the twenty-sixth day of September, 1814, the American private armed brig General Armstrong cast anchor in the port of Fayal, a part of the dominions of the crown of Portugal, to get a supply of fresh water. In the afternoon the British brig Carnation, of 18 guns; the ship Rota, of 38 guns; and the 74 gun-ship Plantagenet, came into port, and anchored about seven o'clock. In the evening four boats approached the General Armstrong. Captain Reid repeatedly hailed them, and

warned them to keep off. They continued to approach, when he fired on them and killed and wounded several men. The boats returned the fire, and killed one man, and wounded the first lieutenant. The British then retreated, and about midnight renewed the attack with twelve boats and about four hundred men, which ended in their total defeat with great slaughter, and the partial destruction of their boats. The American brig carried seven guns, and their crew amounted to ninety men. She had two killed, and seven wounded, while the killed and wounded on the part of the British must have been nearly two hundred men. So great was the loss that the Thais and Calypso, two sloops of war, which arrived a few days after, were sent home with the wounded men. The British commander, Captain Lloyd, finding this mode of attack unavailing, with laudable discretion anchored the Carnation close in shore, and cannonaded the brig, when her gallant defenders finding it useless to resist such an overwhelming force, abandoned the vessel, and she was then safely set on fire by the British.

The kingdom of Portugal was neutral, or professed to be so, in the war between the United States and Great Britain, and Fayal was a neutral port. Any violation of the neutrality of the port, by either of the belligerents, was a breach of the law of nations. The property of belligerents when within the neutral jurisdiction is inviolable. It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution.—1 Kent. Com., 117; Vattel, B. 3, ch. 7, § 132. In the case of the *Twee Gebroeders*, 3 Rob., 136, Sir William Scott says, that no use of a neutral territory for the purposes of war is to be permitted. "Such an act as this," he says, "that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted.'

That there was a violation of the neutrality of the port of Fayal by the one party or the other is indisputable. If the party attacked

merely exercised the right of self-defence, that cannot be a cause of complaint. It is a question of fact, to be determined upon an examination of the evidence, which party violated the rights of the neutral by attacking the other. Did the American brig, with her seven guns and ninety men, commit the folly of attacking the boats of the British squadron, reinforced as their crews might almost instantly have been by many hundreds of men, or did the British commander, seeing the brig lying, as he imagined, helpless within his grasp, determine to attack and carry her at all events; and did he pursue the course which any officer would have adopted if his object were to capture an enemy's vessel? This, of itself, would, according to Sir William Scott, have been a violation of neutrality. "Suppose," he says, "that even if a direct hostile use should be required to bring it within the prohibition of the law of nations, nobody will say that the very act of sending out boats to effect a capture is not in itself an act directly hostile." Chancellor Kent says, "no measure is to be taken that will lead to immediate violence."—1 Kent Comm., 118. Upon this point the law is clear and indisputable.

The first question that presents itself is a question of fact, and that is, whether, in this transaction, the British or the Americans were the aggressors. More than forty-one years have elapsed since the affair happened. We are not, however, forced to depend upon the testimony of witnesses given for the first time after so long a period, and for the credit of which, time, and the failure of memory, might properly require us to make some deduction. We have the statements of those who were actors in the transaction, made at the time of its occurrence, and with every opportunity of knowing the truth. It is agreed by the counsel on both sides, that the facts and the law are now both before us, and the various questions in the case have been argued with a skill and ability that leave nothing to be desired. We shall endeavor to examine the evidence, irrespective of the consideration that the United States and Great Britain were then at war, and of any national feeling that might be excited by

the sanguinary conflict that took place in the harbor of Fayal. We shall examine, in the first place, the testimony of the witnesses, both American and English, who were actors in the transaction.

On the 27th day of September, 1814, Samuel C. Reid, the captain of the Armstrong; Frederick A. Worth, the first lieutenant; Robert Johnson, third lieutenant; Benjamin Starks, sailing-master; John Brosnoham, surgeon; Robert E. Allen, captain of marines; Thomas Parsons, James Davis, Eliphalet Sheffield, and Peter Tyson, prize masters of the brig, made oath before Mr. Dabney, the American consul for the Azores, to a declaration and protest, the material parts of which are as follows: "That he (Reid) sailed in and with said brig from the port of New York, on the ninth day of September last past, well, found, staunch, and strong, and manned with ninety officers and men for a cruise; that nothing material happened on the passage to this island, until the twenty-sixth instant, when she cast anchor in this port, soon after twelve o'clock at noon, with a view to get a supply of fresh water; that during the said afternoon his crew were employed in taking on board water, when about sunset of the same day, the British brig of war, Carnation, Captain Bentham, appeared suddenly, doubling round the northeast point of this port; she was immediately followed by the British ship Rota, of thirty-eight guns, Captain P. Somerville; and the seventy-four gun ship Plantagenet, Captain Robert Lloyd; which latter, it is understood, commanded the squadron. They all anchored about seven o'clock, P. M., and soon after, some suspicious movements on their part, indicating an intention to violate the neutrality of the port, induced Captain Reid to order his brig to be warped in shore, close under the guns of the castle; that in the act of doing so four boats approached his vessel, filled with armed men. Captain Reid repeatedly hailed them, and warned them to keep off, which they disregarding, he ordered his men to fire on them, which was done, and killed and wounded several men. The boats returned the fire, and killed one man, and wounded the first lieutenant; they then fled to their ships and prepared for a second and more formida-

ble attack. The American brig, in the meantime, was placed within half cable's length of the shore, and within half pistol shot of the castle. Soon after midnight, twelve, or as some state, fourteen boats, supposed to contain nearly four hundred men, with small cannon, swivels, blunderbuses, and other arms, made a violent attack on the said brig, when a severe conflict ensued, which lasted near forty minutes, and terminated in the total defeat and partial destruction of the boats, with an immense slaughter on the part of the British. The loss of the Americans in the action was one lieutenant and one seaman killed and two lieutenants and five seamen wounded. At daybreak, the brig Carnation was brought close in, and began a heavy cannonade on the American brig, when Captain Reid, finding further resistance unavailing, abandoned the vessel, after partially destroying her, and soon after, the British set her on fire. The said Captain Reid, therefore, desires me to take his protest, as he, by these presents, does most solemly protest, against the said Lloyd, commander of the said squadron, and against the other commanders of the British ships engaged in this infamous attack on the said vessel, when lying in a neutral, friendly port; and the said Captain Reid also protests against the government of Portugal, for their inability to protect and defend the neutrality of this their port and harbor; as also, against all and other State or States, person or persons, whom it now doth or may concern, for all losses, costs, and damages that have arisen, or may arise to the owners, officers, and crew of the said brig General Armstrong, in consequence of her destruction, and the defeat of her cruise, in the manner aforesaid."

It will be perceived that Captain Reid and his officers state that some suspicious movements, indicating an intention to violate the neutrality of the port, induced Captain Reid to order his brig to be warped in shore, close under the guns of the castle; "that in the act of doing so, four boats approached his vessel filled with armed men. Captain Reid repeatedly hailed them, and warned them to keep off, which they disregarding, he ordered his men to

fire on them, which was done, and killed and wounded several men. The boats returned the fire, and killed one man and wounded the first lieutenant."

Here ten witnesses, upon whose veracity no imputation has been cast, and who had the means of observation, give an account of a transaction which happened under their own eyes, and in which they took a part.

On the other side is the deposition of Lieutenant Robert Fausset, sworn to on the 27th of September, 1814, before the British consul at Fayal, who states that, "on Monday, the 26th instant, about eight o'clock in the evening, he was ordered to go in the pinnace or guard-boat, unarmed, on board his Majesty's brig Carnation, to know what armed vessel was at anchor in the bay; when Captain Bentham, of said brig, ordered him to inquire of said vessel; which, by information, was said to be a privateer. When said boat came near the privateer, 'they hailed to say the Americans,' [which probably should be, "the Americans hailed,"] and desired the English boat to keep off, or they would fire into her; upon which, Mr. Fausset ordered his men to back astern, and with a boat-hook was in the act of so doing, when the Americans, in the most wanton manner, fired into the said English boat, killed two and wounded seven, some of them mortally; and this, notwithstanding said Fausset frequently called out not to murder them, that they struck and called for quarters. Said Fausset solemnly declared that no resistance of any kind was made, nor could they do it, not having any arms, nor, of course, sent to attack said vessel. Also several Portuguese boats, at the time of said unprecedented attack, were going ashore, which, it seems, were said to be armed."

This deposition is said, in the letter of Count Tojal to Mr. Hopkins, of September 29th, 1849, to be "confirmed under oath by the master and one seaman of that barge."

The contradictions are, that the protest says the boats were armed, while Fausset says they were unarmed; the protest says the fire was returned, while Fausset says they made no resistance; the

protest says four boats approached the brig, while Fausset says he approached with the pinnace only ; the protest says that the boats disregarded the warning of Captain Reid to keep off, and that then he fired ; Fausset says that upon being ordered to keep off, he ordered his men to back astern, and was in the act of doing so when the Americans fired. Upon all these matters, there is the testimony of ten witnesses from the brig, against three from the boat ; and, of course, the weight of evidence is decidedly in favor of the Americans, admitting all the witnesses to have been equally honest, and to have possessed equal opportunities for knowing the truth.

Now, upon this evidence, derived as it is from the actors in the transaction, who are the very best sources of information, no intelligent jury could doubt for a moment that the statements in the protest were proved. They would find the facts to be, as we do, that four armed boats approached the brig ; that they were hailed and ordered to keep off or they would be fired into ; that they disregarded the warning ; that the Americans then fired and killed some of their men ; that they returned the fire, and killed one man and wounded the first lieutenant. These facts we find to be proved by the evidence.

But there are some statements in Fausset's deposition, which, to say the least, are singular, and which cast some doubt upon the entire correctness of his story. It appears from his deposition that the British knew that the brig was an "armed vessel," and, "by information, was said to be a privateer." He says that "he was ordered to go in the pinnace or guard-boat, *unarmed*," to the Carnation, to know what vessel it was ; and the captain ordered him to inquire of the brig. Now, it is singular, that in the evening, in a time of war, the commodore of a British squadron should be so particular as to order the boat to be *unarmed*, and still more singular that Captain Bentham should, at such a time, order an unarmed boat to approach a vessel which he knew to be armed, and supposed to be a privateer, and probably an American privateer. It was

not by sending out unarmed boats, under such circumstances, that British naval officers attained for their country, and so long exercised, the sovereignty of the seas ; and the British officers of forty years ago, were not trained in a school that would tolerate such negligence. It is singular, also, that Fausset, who was sent to inquire " what armed vessel was at anchor," did not hail the brig at all ; but, instead of lying off at a proper distance and hailing the brig, he was so near, when the Americans hailed *him*, that he says he backed his boat astern *with a boat-hook!* If he went there in his unsuspecting simplicity merely to procure information, was it necessary for him, in that quiet bay, and that moonlight night, to run his boat directly against the vessel's side ? Could he not have laid off a hundred feet from the brig, *too far to board her*, but near enough to get an answer to his question ? His story is entirely inconsistent with the position that he desired only to know what vessel she was, and strongly confirms the assertion in the protest, both that Captain Reid's warning was disregarded, and that the boat returned the fire. It is difficult to understand the purpose of Fausset's allusion to the Portuguese boats, which, " at the time of the attack, were going ashore, which, it seems, were said to be armed," unless it be to intimate that Captain Reid mistook Portuguese armed boats going ashore for English armed boats about to attack his vessel. The Portuguese boats had nothing to do with the affair ; this is the only allusion to them, and the fact of their presence in the bay is wholly immaterial. It may be added that Fausset says more than that the boat was *unarmed*, from which it might be inferred that it was unarmed for an assault merely ; for he says that " no resistance of any kind was made, nor could they do it, not having *any* arms." He thus makes the condition of his boat so extremely defenceless, that his story fails to carry conviction with it.

But it is said the Americans fired the first shot, and were, consequently, the aggressors. That they fired the first shot is clear, but the consequence does not follow that by so doing they were the

aggressors. Sir William Scott says, 3 Rob. 136, "that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted." That the British did send out their boats on a hostile enterprise, is, we think, too clear to admit of a doubt. What, then, was Captain Reid to do, in the face of the moral certainty that the British were determined to capture his vessel? Was he to permit them to come on board; to surrender the brave men who look to him for an example, to be carried to the prison at Dartmoor, or to be compelled to serve against their countrymen in an English frigate? Was he not rather to obey the dictate alike of common sense and military honor, that in doubtful emergencies it is safer and nobler to fight than to retreat; and, beyond all this, had he not a *right*, upon every principle that should animate a commander, having done all that prudence and discretion could ask for, to strike one blow in defence of his ship? We have entirely mistaken the extent of the right of self-defence, if both law and reason did not justify him in firing upon the English boats.

But, even in the absence of direct evidence, the presumption that the boats were armed, and that the intention was hostile, is extremely strong. We were at war with England. When the British squadron came into the port and discovered the American brig, it was well understood that all the vessels present were ships of war. It is absurd to say that these four boats were sent merely to reconnoitre the brig. Such a force was entirely unnecessary for that purpose. Such a thing was never heard of as that, in the evening, in time of war, a naval commander would approach a vessel which he did not know to be friendly, with four boats filled with unarmed men. And even if Fausset's statement be assumed to be correct, and one boat only approached the brig, it is extremely improbable that, if his boat were unarmed, and his intentions were friendly, he would, without hailing the brig, have come sufficiently near to her to reach her with a boat-hook, when it was just as easy to ascertain what vessel she was without coming so near as to excite sus-

picion. Especially would he have been cautious not to come too near, when as the protest states, "Captain Reid repeatedly hailed them and warned them to keep off. It is also worthy of remark that Fausset's deposition, made on the 27th of September, 1814, was not produced until thirty-five years afterwards, when it first made its appearance, on the 29th of September, 1849, in the letter of Count Tojal to Mr. Hopkins. It is singular, too, that a new and entirely different version of the transaction is given in the letter of Senor De Castro to Mr. Barrow, of the 3d of August, 1843, in which he says, "it is affirmed, on the part of Great Britain, that they (the boats) only carried inoffensive men, who were going ashore from their ships on duty, and that they casually met the American brig when she was preparing to leave the port of Fayal." It is enough to say of this statement that it directly contradicts Fausset's deposition, and that both cannot be true.

In addition to the positive evidence and the presumptions, there are also the contemporary declarations of the official persons at the island.

Mr. Dabney, the American consul at Fayal, in his official note to the governor of the Azores, dated at nine o'clock in the evening of the 26th of September, 1814, says: "In violation of the neutrality, etc., the ships-of-war of his Britannic Majesty, now lying in this port, lately ordered four or five armed boats to surprise and carry off the American armed schooner General Armstrong. * * * The boats were repulsed, but a new and more formidable attack is now feared," etc. On the 28th of September, 1814, the governor of the Azores, Elias Jose Ribeiro, states in his dispatch to his government as follows: "We are now, for the first time, made witnesses to a horrible and bloody combat, occasioned by the madness, pride, and arrogance of an insolent British officer, who would not respect the neutrality maintained by Portugal in the existing contest between his Britannic Majesty and the United States of America."

He also says: "I learned that a boat had been sent from the British ships-of-war to examine the privateeer, and on its return

three others had been sent armed, and that the captain of the privateer not wishing to allow them to come on board of his vessel, a fire was begun on both sides."

The governor then states that he desired a conference with the British commander, that he "might dissuade him, if he were a reasonable man, from continuing the hostilities begun so insolently, and repeated, to the scandalous contempt of the law of nations."

He further says that he conceives the British commander "was aware of the great evil done by his hostile expeditions in a port not only neutral, but, moreover, belonging to an old friend and ally of his nation;" and that he wishes to show him his "resentment on account of the insults committed by him;" nor did he consider his invitation to visit his ship "either proper or decorous."

The British commander, in answer to a request by the governor, that he would respect the neutrality of the port, states, on the 26th of September, "that one of the boats of his Britannic Majesty's ship under my command was, without the slightest provocation, fired on by the American schooner General Armstrong, in consequence of which two men were killed and seven were wounded; and that the neutrality of the port, which I had determined to respect, has been thereby violated. In consequence of this outrage, I am determined to take possession of that vessel." To this the governor replied: "I must, however, assure you, sir, that from the accounts which I have received, it is certain that the British boats were the first to attack the American schooner."

It appears, also, from the diplomatic correspondence, that the United States always asserted, and that Portugal for a long time admitted, that the British were the aggressors, and that there was a just claim against Portugal.

In the letter of the Marquis d'Aguiar, the Minister of Foreign Affairs, to Lord Strangford, the British minister, of December 22d, 1814, he speaks of "the outrageous manner in which that commander violated the neutrality * * by audaciously attacking the American privateer," and of "the base attempt of the British com-

mander, at the time he commenced the unprovoked attack on the American privateer, to attribute those violent measures to the breaking the neutrality on the part of the Americans in the first instance."

He states, also, that the Prince Regent had "directed the minister at London * * to require satisfaction and indemnification not only for his subjects, but for the American privateer, whose security was guaranteed by the safeguard of a neutral port."

Mr. Sumter, the American minister at Rio, in his letter of January 1, 1815, to the Marquis d'Aguiar, speaks of separation to the Prince Regent of Portugal, for so "rude and degrading an attack upon his sovereign authority."

In this letter to Mr. Sumter the Marquis speaks of "the manifest violation of his territory (by the British) in the infringement of its neutrality."

In Mr. Monroe's letter, of the 3d of January, 1815, to Mr. Sumter, he says: "The growing frequency of similar outrages on the part of Great Britain renders it more than ever necessary for the government of the United States to exact from nations in amity with them a rigid fulfillment of all the obligations which a neutral character imposes."

On the 14th of March, 1818, Mr. Adams, in a letter to the Portuguese minister at Washington, said: "It is hoped your government will, without further delay, grant to the sufferers by that transaction the full indemnity to which they are by the laws of nations entitled."

In the letter of Mr. Dickens, the acting Secretary of State, of the 20th of May, 1835, to Mr. Kavanagh, the American chargé at Lisbon, he says: "The Portuguese authorities at that place having failed to afford to this vessel the protection to which she was entitled in a friendly port, which she had entered as an asylum, the government is unquestionably bound by the law of nations to make good to the sufferers all the damages sustained in consequence of the neglect of so obvious and acknowledged a duty."

Mr. Kavanagh states to Mr. Forsyth, from Lisbon, on the 30th of January, 1836: "It appears that the British commander alleged at the time, that the crew of the General Armstrong had provoked the first attack by firing into his boats; but the protest made and signed on the 27th of September, 1814, by Captain Reid and all his officers, and corroborating circumstances, disprove this allegation." He repeats his demand for indemnity in his letter of the 17th of February, 1837, to the Portuguese Minister of Foreign Affairs.

In his dispatch to Mr. Forsyth, of the 18th of March, 1837, he states that he had had an interview with the minister, who "spoke of the claim as one which at present could not be considered admissible;" and who said that "the Portuguese force at Fayal was altogether incompetent to protect the privateer against the assailants."

On the 15th of January, 1842, Mr. Webster wrote to Mr. Barrow concerning the claim: "Its justness, I believe, has never been denied." And Mr Barrow makes the same statement in his letter of May 25th, 1842, to the Portuguese Minister of Foreign Affairs. Mr. Webster, in his letter to Mr. Barrow, of the 18th of August, 1842, speaking of this claim and that of James Hall, says: "Both these claims are regarded as just by this government, and will not be relinquished under the objections heretofore made to them by the Portuguese government, which are entirely unsatisfactory."

Mr. Barrow, in his letter of February 20th, 1843, to Mr. Webster, says: "The pretexts for the delay in the two former cases (the General Armstrong and James Hall) are of a very frivolous character, and such will continue to be given, I am convinced, until a very decided tone is assumed by our government." On the 20th of March, 1843, he writes: "There has been from the first a manifest disposition, I might say determination, on the part of the Portuguese government * * * * * * * * to avoid the liability to which they are subject by the law of nations in the case of the General Armstrong."

Such are the contemporary declarations of witnesses who saw the transaction; the indignant remonstrance of the governor of the Azores; the admissions of the Portuguese government of the existence of a claim on our part, contained in their demand for an indemnity from England, on account of the loss of the brig, and the repeated assertions of our government of a violation of the neutrality by the British. Until the 4th of August, 1843, there had been no denial, but an admission of the justice of this claim upon them. But on that day the Portuguese Minister, in a letter to Mr. Barrow, says: "The accounts all agree that the American brig, under the pretext that four boats from the said British vessel were approaching her, fired upon them, killing some of the men and wounding others. * * * It is, however, an undeniable fact that the first shot came from the American brig, *thus evidently constituting her the aggressor*, and a violator of the neutrality of the port of a friendly nation."

Now the Portuguese Minister must be presumed to have read the evidence on the subject concerning which he thought fit to write a letter, and his most extraordinary declaration that all the accounts agreed that the American brig was the aggressor, must have been made in the face of the letter of the governor of the Azores, of the 27th of September, 1814, that it was "certain that the British boats were the first to attack the American schooner;" and of his other expressions of indignation at the conduct of the British. Whatever it arose from, whether from an inability to appreciate the evidence, a disposition to procrastinate, or an unwillingness to offend the British government, its incorrectness is manifest. It may be remarked, that among the published documents are to be found allusions to the influence of the British minister in hindering the payment of this claim by Portugal. It is singular, indeed, that the Portuguese government should not have discovered that the evidence proved the Americans to have been the aggressors until twenty-nine years had elapsed since the affair, and until the production of Faunset's deposition, which had slumbered in obscurity during that period

That the British government felt an interest in the matter, appears from Mr. Clayton's speech in the Senate, on the 26th of January, 1855. He says that the British minister "desired to confer with me, on one occasion, in regard to the matter, but I declined any conference with him on the subject. I though the British government had no right to interfere."

The governor of Fayal made no complaint that the Americans had violated the neutrality of the port. That discovery, as has been stated, remained to be made by the Portuguese minister, in 1843. The governor did, however, complain of Captain Lloyd, and remonstrated against his proceedings; and even the minister, in his letter of August 3, 1843, says, that "the government of his Britannic Majesty, appreciating the rashness with which his officers acted in a neutral port against said brig, had no hesitation in apologizing to the Portuguese government." This statement, however, was denied by the British government, as appears from the letter of Count Tojal to Mr. Clay, of the 15th of May, 1850. It does not appear to be necessary to settle the question of veracity between them.

Considering it, then, as proved, that the British were the aggressors, the question arises, whether it was the duty of Portugal, according to the law of nations, to make pecuniary compensation for the damages sustained by the injured party.

Upon this point the opinion of the government of the United States, as expressed through the various Secretaries of State, is entitled to much weight. That Portugal was bound to pay the damages sustained, is asserted by Mr. Monroe, Mr. Adams, Mr. Forsyth, Mr. Upshur, Mr. Webster, and Mr. Clayton. Mr. Forsyth, in his letter of September 21, 1836, instructs Mr. Kavanagh to "demand from the Portuguese authorities, the highest amount of damages which in your judgment a prudent and conscientious man would feel himself justified in asking, were he prosecuting his own claim." The same instructions are given to Mr. Clay, in Mr. Clayton's letter of March 8, 1850.

It is doing the eminent men who have occupied the responsible

position of Secretary of State, great injustice to assert that when they alleged that Portugal was liable in damages, they did not express their honest convictions, but condescended to the position of an advocate. They had no temptation to say what they did not believe. The claim was not made a party question, nor did it have any connection with party politics. There was no call upon them to hazard their reputation as statesmen and jurists, upon a position which they did not believe to be tenable.

But the case of Portugal is attempted to be put on the ground that she was unable to protect her neutrality.

To this position there are two answers. In Count Tojal's letter of March 9, 1850, to Mr. Clay, he says that, "no neutral is obliged to give pecuniary indemnification for damages and material losses that may have been caused in its ports by one belligerent to another, once it can be shown that it has used all the means at its disposal to give protection."

The answer to this is thus strongly put by Mr Clay, in his letter to Count Tojal, of March, 15, 1850. He says : "What were the means in her power ? She had the physical power of more than one hundred regular soldiers, some artillery, a fort, the power of the population of Fayal, about thirty American seamen, who requested to be allowed to defend their brethren, great advantage of position, and the immense moral power of right against wrong ; these were the means she had. Did she use all or any of them to protect and defend the privateer ? Confessedly she did not ; she even went beyond mere failure to defend or protect, when she prevented the American seamen from rendering whatever assistance was in their power. And if she did not use *all these means*, is it not clear from his excellency's own argument, that she is bound to indemnify ?"

The whole tenor of the dispatch of the governor of the Azores, of the 28th of September, 1814, shows that he used no means whatever with the British commander but expostulation. Although indignant at the outrage upon the sovereignty of Portugal, the dis-

patch needs only a careful perusal to make it apparent that the governor was paralyzed by the position in which he stood, and that he had no firmness. He seems to take credit to himself for refusing to consent that the American seamen might aid in defending the brig, for taking away from the Americans, as they came ashore, their swords and pistols, and for the energetic feat of ordering the standard not to be hoisted over the castle the next morning, to show his resentment at the conduct of the British. He mentions also his decided act, in seizing two American seamen, who, during a funeral, "gave shouts of joy on account of the fight and retreat in which these officers lost their lives." All these might have been very bold and gallant acts, but unfortunately for him, his own government did not approve of his conduct. The Marquis d'Aguiar, the Portuguese Minister of Foreign Affairs, in his letter to Lord Strangford, of the 22d of December, 1814, says, that if it were not for the idea that he desired to protect the inhabitants from the ravages which the British commander would not have failed to inflict, "the censurable moderation of the governor during these outrages would have induced his royal highness to have immediately caused a process to have been instituted for the punishment of that officer." The question is not whether Portugal was a stronger or a weaker nation than Great Britain. It is simply whether at Fayal, and under the existing circumstances, the governor did what his duty required of him as an officer of a neutral nation; and his government answered that question by saying that he *did not* do his duty. With these facts and admissions, it is almost idle to say that Portugal was not bound to make indemnity, because she was weak. Bynkershoeck says: "If it be the duty of the sovereign to use his utmost endeavors to effect that purpose, it follows that he must do it at his own expense. Nay, by going to war, if other means are not sufficient. Such is the law which is observed among all nations."—Bynkershoeck's Law of War, by Duponceau, p. 60.

But admitting, for the sake of argument, that the governor of the Azores used all the means in his power, and was unable to resist

the British force, the other answer to the position is, that the law of nations did not relieve her from the obligation to make pecuniary compensation.

Now, if Portugal was unable to protect her neutrality, that was her misfortune. Chancellor Kent says: "If the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution."—1 Kent, 122. That is, if the enemy be attacked, the neutral is bound to redress the injury; if a capture be made, the neutral is bound to effect restitution. The question here does not relate to restitution of property captured, but to the redress of an injury from a hostile attack. How is an injury, sustained by reason of an attack upon the property of an enemy's citizen, to be redressed, but by paying for the injury done? The position is stated absolutely, and without any provisoes or limitations. Can it be that a neutral is bound to restore a ship captured in its waters; but if the ship be captured, and then sunk by the enemy, no duty whatever rests upon the neutral? The same reason which requires a neutral to restore a captured vessel, calls on it also to make compensation where a vessel is destroyed. The same principle lies at the foundation of either duty. The position that a neutral is bound to make restitution, but not compensation, may thus be stated: If the neutral sees a ship captured in its waters, and is able to effect restitution, it is bound to do so. But if restitution cannot be made from whatever cause, then the neutral is to remonstrate to the belligerent who has done the wrong, and who knows that the neutral has done all it could; and if the belligerent refuses to do anything in the matter, still the law of nations is satisfied, and the affair is settled. Such was the course adopted in the present case. The vessel was destroyed by the British, and the neutral remonstrated, consequently, the neutral was absolved from all obligation to make compensation. This distinction between restitution and reparation, although inappreciable, by the unassisted reason, may exist in virtue of some mysterious *afflatus*, which is supposed to inspire the councils of diplomatists. It is enough to say

that it deprives the law of nations on this point of all vitality, and reduces it to a solemn absurdity. When a ship is destroyed, this distinction releases the neutral from the obligation to do what is physically impossible, but it absolves the neutral from the duty of doing the only thing in its power, that is, to effect restitution.

It is unnecessary to take the position that a neutral is bound always to have in all its ports a force sufficient to resist any attack that might be made. This would be unreasonable ; for even England, with her powerful navy, could not accomplish it. But it is equally unreasonable to say that because a neutral did not happen to have at any given place a sufficient force to protect its neutrality, therefore it is absolved from all duty, happen what may. That Portugal, relatively to England, was a weak nation, may be admitted. But she assumed to be neutral in the war between England and America. As she claimed the rights, so she was subject to the obligations of neutrality. If she was not strong enough to cause herself to be respected as neutral, she should not have placed herself in that position. She chose her part in the great republic of the world, and stood in the relation to other nations upon a common ground with them. It is said by Vattel, Prel. ch. § 18, "since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature, nations composed of men, and considered as so many free persons, living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant ; a small republic is no less a sovereign state than the most powerful kingdom." This is a clear and precise statement by an eminent writer of the reciprocal rights and obligations of nations, whatever may be their relative power. As weakness does not deprive a nation of its rights, it does not release her from the obligations which she owes to other nations. A nation may be weak as regards armies and fleets, but she may be wealthy. It may be a

part of her policy to avoid the expenditure of her resources in military and naval preparation. She may choose to lavish her revenue upon the empty forms and pageantry of government, disregarding and careless of the advance and happiness of her people. But it would be strange indeed, if the course she might see fit to adopt of her own free will, should be received as an excuse for her non-performance of the duties which she would exact towards herself from nations whose government might be better administered, and whose revenues might be more carefully expended.

In Molloy's Treatise De Jure Maritimo, B. 1, Ch. 1, sec. 16, a case is stated which affords an exact precedent for the one before us. After mentioning several cases where hostile encounters were forbidden in neutral ports, he says: "But they of Hamburgh were not so kind to the English when the Dutch fleet fell into their road, where rid at the same time some English merchantmen, whom they assaulted, took, burnt, and spoiled; for which action, and not preserving the peace of their port, they were, by the *law of nations*, adjudged to answer the damage, and I think have paid most or all of it since."

It is not to be expected that many precedents are to be found exactly resembling the present case, which was so peculiar in its circumstances. During her long war with France, England, by her powerful navy, was enabled to set at defiance the law of nations in respect to neutrals with impunity; but the case cited from Molloy, shows that the English claimed from Hamburgh, in 1665, the same compensation in damages which the present claimants demanded from Portugal. It is unnecessary for us to pursue the investigation of the question as to the liability of Portugal any further. We have the opinion of the most eminent jurists and diplomatists of the United States, the authority of Molloy, and, as we think we have shown, the intrinsic propriety and reasonableness of the position. We have found nothing in the books which deserves to be weighed against these views. Even Flanders, in his treatise on Maritime Law (p. 45,) although he states, as his individual opinion, that the

reasoning which maintains the obligations of the neutral to answer damages, seems to him to be inconclusive, admits that it is held by writers on the law of nations that the neutral is bound to redress the loss himself. But he cites no authority to the contrary, and he can find no stronger ground on which to found his opinion, than that the neutral is a host extending his hospitality to a belligerent who comes into his port. But, with submission, we conceive that such is not the relation in which the parties stand to each other. A nation which assumes to be neutral has certain duties which she is compelled, by the law of nations, to perform. It is said by Vattel, book 3, ch. 7, § 118 : "A neutral nation preserves towards both the belligerent powers the several relations which nature has instituted between nations. She ought to show herself ready to render them every office of humanity reciprocally due from one nation to another. She ought, in everything not directly relating to war, to give them all the assistance in her power, and of which they may stand in need." It thus appears that the neutral is not a host extending hospitality *ex merâ gratiâ*, but is part of the great republic of nations, bound to render offices of humanity. The parallel of this writer, therefore, fails, and his opinion must fall with the inaccurate figure which he uses to illustrate his views.

Our opinion is, that Portugal was bound, by the law of nations, to make to the claimants pecuniary compensation.

The proposition to refer this case to an arbitrator, came from the Portuguese government. The course of the United States had been consistent throughout. We had always maintained that we had a valid claim upon Portugal ; that the facts showed that the British were the aggressors, and that, by the law of nations, Portugal was bound to redress the injury sustained by our citizens. The first remark on the subject of an arbitration we have found, is in Mr. Clayton's letter of the 8th of March, 1850, when he wrote to Mr. Clay, the American chargé d'affaires at Lisbon : "In regard to a reference of our claims to an arbitrator, which has been indicated, the President has directed me to say that no such course will, under

the circumstances, receive his sanction ; and this for reasons too obvious to need enumeration." On the 30th of April, he wrote to the Portuguese minister at Washington, that the matter would be referred to Congress, "should the Portuguese government persevere in the refusal to adjust and and settle what are believed to be the incontrovertible claims of American citizens upon that government," and he rejected the proposition of the minister to submit this claim to arbitration.

The treaty between the United States and Portugal was concluded on the 26th of February, 1851. The first article provides that Portugal shall pay to the United States a sum equivalent to the indemnities claimed for several American citizens. By the second article it is agreed that the parties, "not being able to come to an agreement upon the question of public law involved in the case of the American privateer brig General Armstrong, that the claim presented by the American government, in behalf of the captain, officers, and crew of the said privateer, should be submitted to the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contrating parties."

In relation to the arbitration we may remark, that in whatever we may say upon the subject, we do not mean to be understood as denying the right of the government of the United States, acting for the whole people, to submit to arbitration any controversy with a foreign government, in which public interests are alone involved. Nor is it necessary to deny the power of the United States to submit to arbitration the claim of one of its own citizens upon a foreign government which it has been prosecuting, in such a way as to preclude itself from again pressing that claim upon such foreign government, or insisting upon it in any way as a cause of war, or a matter of national concern. There is a broad distinction between the submission of a case involving national interests exclusively, and the submission of a case relating to private rights alone, where the only matter of public concern is the general duty of a government to protect its citizens. Where a case of the latter description

is submitted, it must be done with a due regard to the rights of the citizen. If his rights be disregarded and sacrificed, it is the dictate alike of law, common sense, and justice, that the government by which his rights have been sacrificed, should make him restitution. We think it cannot be denied, that to relieve a government from liability to a citizen on this account, it should appear that the case was one proper to be submitted ; that he had an opportunity of being heard before the arbitrator by argument and proofs ; that the award was certain, definite, and within the submission ; and that the arbitrator did not exceed his powers.

In the first place, we are unable to perceive what good and sufficient reasons there were, that required the United States to submit the claims of their citizens upon a foreign government to arbitration. We find no reasons alleged in the correspondence that led to the submission. A citizen of this republic is entitled to ask his government, respectfully, why a given course was pursued in relation to his private rights. The government holds its public powers by no higher tenure than the citizen possesses his private rights. Public powers are delegated, and private rights are possessed, by the will and assent of the people. The day is gone by, at least on this side the Atlantic, when the rights and interests of millions can be settled definitely by diplomatists in secret session, and when no other answer to a complaint is condescended, than that such matters are mysteries of State, into which even the party aggrieved has no right to inquire. We intrust our public interests to our public officers, in the confidence that they will discharge their duty. If those duties are neglected or mismanaged, we find a remedy in the ballot-box. But when a citizen has a claim upon a foreign government, which, from the nature of the case, as he is powerless against the foreign government, can only be redressed through the agency of his own government, and that claim is sacrificed by his government, he has no remedy, unless his government will indemnify him. He may, surely, with propriety, ask the question, why his claim was submitted ? In the present case, that the British

were the aggressors was a fact, patent, known at the time to hundreds of persons, which we had always asserted to be true, and which the evidence proves to be true. No impartial man can investigate the evidence and reach any other conclusion. Not only is the evidence on the point overwhelming, but such has always been the position taken by the United States from 1814 to 1841, by every administration, every Secretary of State, every American minister, and, until the year 1843, admitted to be true by the Portuguese government itself. If, as Mr. Webster wrote to Mr. Barrow on the 13th of January, 1842, the justice of this claim had never been denied, why did that eminent man consent to submit it to arbitration? What call was there upon him to put it out of the power of the United States to perform that first and most sacred of duties, protection of the rights of the humblest citizen. A party who has a claim, of which no one denies the justice, is a most unfit manager of his business, when he submits it to arbitration, and thereby gives the arbitrator a discretionary authority to allow or reject it at his pleasure. We had always asserted that Portugal was bound by the law of nations to redress this injury; and there is nothing in any part of the diplomatic correspondence on our part that tends to show that we ever intended to recede from this position. We had positively asserted that both the law and the facts were with us. We had expressed our views in every form. We had presented a firm, but temperate statement. We had resorted to argument. We had, finally, asserted our fixed determination that the injuries of our citizens *must* be redressed. Such being our position, the inquiry may properly be made, why the various questions in this case, involving the private rights of American citizens, should be exposed to the hazard of being loosely and partially considered by an European sovereign who, to say the least, would be as likely to be influenced by considerations of state policy as by a regard to individual rights. If the government did not see fit to have recourse to arms to enforce the claim, they might, at least, have abstained from compromising the rights of the claimants.

But when the government were convinced that the facts were as the claimants alleged, the conclusion of law followed of course. The claimants alleged that the British were the aggressors. The government believed that such was the case, and that Portugal was bound to pay the claim. These positions, then, being distinctly taken, it may safely be said, that if this was a proper case for a submission, no case ever existed that would justify a resort to hostilities, so long as an arbitrator could be procured to determine the controversy.

But whether this case was, in itself, under the circumstances, proper to be submitted to arbitration, there is a further view to be taken of the submission.

On the 13th day of April, 1850 (Doc. 53, page 56), Count Tojal wrote to Mr. Clay that the Portuguese government "will now propose to refer this affair to the decision of a third power." In his letter of July 6, 1850 (Doc. 53, page 73), Count Tojal refers to several claims of American citizens upon Portugal. A list of them is given, with the amount claimed in each. They are ten in number, and the aggregate amount was $233,327. The amount claimed in the case of the General Armstrong was $131,600. The others amounted to $91,727. Count Tojal then says: "The government of her majesty, animated with the same desire, etc., yields to the force of circumstances, and without again reverting to the justice or injustice of the claims presented by the government of the United States, and only *pro bono pacis*, offers to pay the said mentioned claims, amounting to $91,727, according to Mr. Clay's account, with the only exception of that relating to the privateer General Armstrong. In respect to this claim the undersigned cannot deviate from the proposal heretofore made to Mr. Clay, that of so important a claim being submitted to the decision of a third power."

It is to be noticed that the justice and legality of the claims, which Count Tojal thus offered to pay, had been denied as strenuously as the claim relating to the General Armstrong. Why the

Portuguese government were unwilling to pay this claim, is indicated by the following extract from the same letter of Count Tojal: "Her majesty's government, besides the arguments contained in the notes formerly addressed to the government of the United States, finds its judgment, and the manner of weighing the question of the privateer General Armstrong, strengthened with the opinion of her Britannic majesty's government, which has always deemed this claim of the government of the United States unjust." Why, again, it was necessary for Portugal to ask the opinion of England, is shown by another extract from Count Tojal's letter, in which he says: "The subsisting relations between her most faithful majesty's government and that of her Britannic majesty, *oblige* the undersigned to communicate to the British government all that has taken place."

But whatever influences operated upon the Portuguese government, and it is not difficult to appreciate them, the proposition made by Count Tojal was not divisible. It was complete in itself. It was not an absolute proposal to pay the other claims, but to pay them, and to submit this to arbitration. As Portugal had, up to the time of the proposition, invariably denied the justice of the other claims, and as she said she offered to pay them and submit this, only *pro bono pacis*, we could not have called on her to pay the other claims, unless we agreed to submit this to arbitration. It would have been unreasonable in the extreme if our government had called upon Portugal to pay the other claims without agreeing to submit this. But that the proposal was one and indivisible is, we think, too clear to admit of question, or to need argument in its support. When, therefore, our government decided to accept the proposal, as it did, by Mr. Webster's letter of the 23d of August, 1850, it assumed the right, which, in the present case, we are not disposed to deny or inquire into, of exposing the claim of the owners of the General Armstrong to the chances of an arbitration, for the purpose of procuring thereby the settlement of the remaining claims upon Portugal, and of putting an end to all embarrassing negotiations with that power.

The case does not call upon us to deny the right of the United States to submit to arbitration the claim of a citizen upon a foreign government without his assent, or even against his protest, and the question need not be investigated. Of course, his assent would estop him afterwards from objecting that a submission was entered into. As there is evidence upon this point, we have examined it for the purpose of showing the relative position of the claimants and the United States.

On the 5th of September, 1850, Mr. Reid, the agent for the claimants, wrote to Mr. Webster: "I perceive it is proposed to refer the claim of the owners of the brig General Armstrong to the King of Sweden for arbitration. I hope the Department of State will make no final arrangements in this case, under the present circumstances, and I desire that it may be left open until I can have a conference with you on the subject. * * * * I hope no steps will be taken which will compromise the rights of the claimants, until I can have the pleasure of seeing you." To this letter Mr. Webster answered, on the 13th of September, that the proposition of Count Tojal to pay the several claims preferred by the American government against that of Portugal, with the exception alone of that of the General Armstrong, which was to be referred to the King of Sweden etc., had already been accepted by the government.

We look in vain here for any evidence of assent to the submission. When Mr. Reid hears that it is proposed to submit the claim, he hopes that the matter will be left open until he can have a conference with Mr. Webster, and that no steps will be taken that will compromise the rights of the claimants until he can see him. Do these words mean the very reverse of what they express? Does Mr Reid mean, when he uses this language, to say that he assents to the submission? If so, language was given us to disguise our thoughts, and not to express them. But not only does he not assent to the submission, but it was agreed to without any opportunity for him to assent or dissent, and without his knowing anything about it; for Mr. Webster informs him that the proposal of Count

Tojal had already been accepted. If there ever were a plain case of dissent, it is furnished by Mr. Reid's letter. There is no evidence of his acquiescence in the submission, for all he did was to request that he might be heard before the arbitrator, after he was informed that the treaty had been concluded.

It may be proper to notice, in this connection, a position taken by the solicitor, that a claimant, in a case like this, is conclusively bound by the action of his government. In the instructions to Mr. Kavanagh, of the 21st of September, 1836, Mr. Forsyth says: "It is well understood that after asking the interference of their government to procure redress for the injuries they supposed themselves to have sustained, the parties must abide by such settlements as that government may make." This proposition cannot be correct in the broad language used. No individual can urge his claims upon a foreign government with any hope of success, excepting that derived from their sense of justice. A private person, armed with no power of enforcing his rights, and unassisted by his own government, cannot speak in sufficiently impressive tones to ensure his being heard by a foreign nation. His own government, in the discharge of that duty of protection which it owes to its citizens, must speak for him. "If any complaint is to be made on the part of the captured, it must be by his government to the neutral government for a fraudulent or unworthy or unnecessary submission to a violation of its territory." 1 *Kent's Com.*, 121. If Mr. Forsyth's statement be correct, the government would be justified in making use of and surrendering the claim of one of its citizens for the purpose of procuring the payment of the claim of another. If, by saying that "the parties must abide by such settlements as the government may make," it be meant only that the party, after such settlement has been made, cannot enforce his claim against the foreign state, the position is correct. But if it be meant that, whatever settlement the government of the claimant may make, it incurs no responsibility for the claim of its own citizens, the doctrine cannot be admitted. In the case of the *Baron De Bode* vs. *Regina*, 17 Eng.

L. & Eq. Rep., 14, *Lord St Leonards*, the Lord Chancellor, said: "It is admitted law that if the subject of a country be spoliated by a foreign government, he is entitled to obtain redress from the foreign government through the means of his own government. But if, from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country. Here is a compromise of the two governments; the question is, how far his claim is affected by it." It cannot be supposed, however, that Mr. Forsyth intended to convey the idea that whatever course the government might pursue, in no event would it be liable to the claimant. Such a proposition would be, in substance, that the government is not responsible for wrong; a ground which, we presume, no one would seriously attempt to maintain.

Before examining the objections that have been made to the award, it is proper to consider the position taken by the claimants, that they were not permitted to be heard before the arbitrator.

The treaty having been ratified by the Senate on the 7th of March, 1851, on the 19th of March Mr. Webster wrote his letter of instruction to Mr. Hadduck, who had succeeded Mr. Clay as our chargé at Portugal. The material part of this letter refers to the third article of the treaty, which is as follows:

"So soon as the consent of the sovereign, potentate, or chief of some friendly nation who shall be chosen by the two high contracting parties, shall have been obtained to act as arbiter in the aforesaid case of the privateer brig "General Armstrong," copies of all correspondence which has passed, in reference to said claim, between the two governments, shall be laid before the arbiter, to whose decision the two high contracting parties hereby bind themselves to submit."

Mr. Webster directs Mr. Hadduck "to compare and authenticate, jointly with the Portuguese government, the copies therein specified. You will understand, of course, that these copies are limited to such communications as have passed between the Amer-

ican legation and the Portuguese government at Lisbon, and between this department and the Portuguese legation in Washington." On the 12th of July, 1851, Mr. Webster wrote to Mr. Hadduck, and after stating the instructions contained in his previous letter, says: "To provide, however, against an omission of any important part of the earlier portion of the correspondence—I mean that which passed in 1814 and 1815, in Rio Janeiro, where the court of Portugal at that time resided, and which it could not have been intended to exclude—I transmit to you herewith a printed copy of the correspondence as communicated to Congress on the 15th December, 1845." This letter, however, reached Mr. Hadduck too late, as the treaty had been signed on the 23d of June previous. The papers omitted where the whole of document 14 of the Senate, 1st session 29th Congress, covering fifty-eight pages. It is said that the whole of this document is contained in substance in the subsequent correspondence. One letter, however, was omitted, upon which much stress was laid in the argument on the question of fact, as to the party who made the first aggression. This was the letter from Mr. Greaves, the British consul, dated on the 27th of September, 1814, to the governor of the Azores, informing him that if the governor should permit the masts to be taken from the schooner, the commander of the squadron would regard the island as an enemy of his Britannic majesty, and would treat the town and castle accordingly. This was relied upon as tending to prove that Captain Lloyd desired to capture the brig and use her in his operations against this country.

But, not only was no provision made for laying before the arbitrator all the correspondence which might throw light upon the case, but the claimants were refused the privilege of being heard before the authority which was to decide upon their rights. Upon the 7th of July, 1851, the agent of the claimants filed, at the Department of State, a written argument and statement of facts, which he requested might be sent to our minister, that he might submit it to the arbitrator, which was verbally refused, on the ground that the

terms of the treaty precluded it. To two notes to the Secretary of State, to the same effect, he received no answer. He then requested the President that he might be sent to France with the papers and documents, that he might present his case through Mr. Rives; but this was also refused.

It may well be asked here, why was the case so submitted that the party interested could not be heard? If the United States, in the plenitude of their power, see fit to submit the claim of a citizen to arbitration without his assent, ought they not to make the most careful and ample provision that he shall be fully and fairly heard, and that he shall have all reasonable opportunity to lay before the arbitrator the evidence on which he relies? An award made without the party having had an opportunity to be heard, rests neither upon law nor justice. If the case was sufficiently national in its bearings to be submitted to the arbitration of an European prince, it was, surely, important enough to deserve a careful investigation into the facts, and the parties, whose pecuniary interests were involved, were the very persons, of all others, to whom to intrust such an investigation.

The position that every party should have an opportunity to be heard before the tribunal that is to pass judgment on his rights, needs no labored argument to support it. It has been repeatedly asserted by the most eminent jurists. In Rigden *vs.* Martin, 6 H. & Johns., 403, the court said: "that the parties ought to have notice of the time of meeting, is a position so strongly supported by common justice that it would seem not to require the aid of authorities. Every man ought to have an opportunity afforded him to be heard in defence of his rights." In Falconer *vs.* Montgomery, 4 Dallas, 232, it is said: "The plainest dictates of natural justice must prescribe to every tribunal the law that 'no man shall be condemned unheard.' It is not merely an abstract rule, or positive right, but it is the result of long experience and a wise attention to the feelings and dispositions of human nature. * * * Besides, there is scarcely a piece of written evidence, or a sentence of oral testimony, that is

not susceptible of some explanation, or exposed to some contradiction; there is scarcely an argument that may not be elucidated so as to ensure success, or controverted so as to prevent it. To exclude the party, therefore, from the opportunity of interposing in any of these modes (which the most candid and intelligent, but a disinterested person, may easily overlook) is not only a privation of his right, but an act of injustice to the umpire, whose mind might be materially influenced by such an interposition." In the case of Lutz *vs.* Linthicum, 8 Peters, 178, Mr. Justice Story said: "Without question, due notice should be given to the parties of the time and place of hearing the cause; and if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside." In Elmendorf *vs.* Harris, 23 Wend., 628, it was laid down as a fundamental rule of construction in reference to every transaction in the nature of a judicial proceeding, that the contract of submission necessarily implies that the arbitrator is not authorized or empowered to decide the question in controversy, without giving the parties an opportunity to be heard in relation thereto.

Mr. Webster's construction of the 3d article of the treaty, which provided that the copies of the correspondence should be laid before the arbiter, excluded the presentation of any argument. But the article contains no words of exclusion, and it is not to be presumed that the arbiter would have refused to consider an argument for the claimants. The government refused to sanction, in any manner, the presentment of the case of the claimants to the arbiter, and without such sanction, no private person would be permitted to intervene, of his own authority, between two nations. If Mr. Webster's construction be correct, then such a treaty, in violation of the plainest principles of justice, should not have been made. If his construction be wrong, then the agent was most unjustifiably hindered by the government from presenting his case. Whatever may be the true construction of the article, the claimants have suffered a wrong at the hands of the government, for which reparation should be made them.

We come now to the consideration of the award, and it is necessary, in the first place, to ascertain the matter submitted to the arbitrator.

The second article of the treaty is as follows :

"The high contracting parties *not being able to come to an agreement upon the question of public law* involved in the case of the American privateer brig General Armstrong, etc, have consented that *the claim* presented by the American government, etc., should be submitted to the arbitrament of a sovereign," etc.

The claim, then, was submitted, because the parties could not agree upon the question of law ; it was not because they could not agree upon the facts, or the amount of the claim. Thus *the matter in dispute* was the simple question of law. As that question should be determined, so must be the award of the arbitrator. But that question was not determined at all, the award being founded solely upon the facts. If this construction of the submission be correct, it follows that the award is void : firstly, because it does *not* settle the matter in dispute, and the matter submitted ; and secondly, because it *does* settle the question of fact, which was not submitted, and thus exceeds the submission.

But there is another view to be taken of the submission. Although the question of law was that about which the parties were unable to agree, the *claim* was submitted, and this comprehends both the question of law and the question of fact. Having found the question of fact against the claimants, it is urged that this decision, involving the fact that the Americans were the aggressors, is conclusive against the claimants. Such would undoubtedly be the case if the claimants had the priviledge of being heard, by laying before the arbitrator their argument and proofs. But it is to be remembered, that in this case, not only was the submission made without the assent of the claimants—not only were they denied all opportunity of appearing before the arbitrator—but the case, during all the period from the submission to the award, was in no condition to be heard. It had never been prepared for trial. The claimants had done all that was necessary for their immediate pur-

pose : they had presented their claim to their own government, and had requested that it might be urged upon the government of Portugal. Mr. Webster did not suppose that all the evidence had been furnished on which the claimants rested their case, for on the 15th of January, 1842, he wrote to Mr. Barrow : " If the inadmissibility of the claim is made to depend upon the defect of evidence, or upon any other cause, you will ascertain precisely what further evidence is required in addition to that which has already been communicated by Captain Reid, and will be found on file in your legation." The transaction occured in the harbor of Fayal, near to the shore, on a moonlight evening, and in the presence of innumerable witnesses. If the facts were to be contested, the claimants should have had the opportunity of procuring the testimony of those who witnessed the affair, and of placing their case in the most favorable light. This privilege not denied to the humblest suitor, in the most pretty controversy. It has been denied to these claimants by the action of their government. They are remediless as to Portugal, for all claim is barred by the action under the treaty. Their just rights have been disregarded and sacrificed by the United States ; and the question then arises, whether the United States are bound to make them compensation.

In relation to this point, we have the facts that the British were the aggressors ; that the owners of the brig had a valid claim upon Portugal for indemnity ; that the claim was submitted to arbitration by virtue of the power of the United States to do so, without the assent of the claimants ; that the treaty was so worded as, by Mr. Webster's construction, to deprive the claimants of all opportunity of being heard in any manner ; that the United States refused to sanction their application to be heard ; that they were not heard ; that the award was made without their privity, in their absence, and in violation of the universal principle that no one shall be condemned unheard ; and that they were entitled to be heard upon every principle of private justice, public law, and that regard to equity and fair dealing, without which, neither a nation nor an individual can

ever be respected. It is entirely immaterial whether the question submitted was one of law or of fact. Even if we admit, for the sake of the argument, that upon the evidence now before us, it was doubtful which party was the aggressor, and even if we admit in the same way that the validity of the claim upon Portugal was a doubtful question, that does not at all affect the right of the party interested to be heard. So much the greater call was there upon the United States to provide that they should be heard. The principles of justice are universal, and not local. They are as binding upon the Emperor of the French as upon the humblest tribunal. Every step in this affair, from the acceptance of the proposal by Portugal to submit the case, to the ratification of the treaty, was the act of the United States alone. The award having been made against the United States, they are answerable to the claimants for the loss they have sustained, upon the principle that a nation, being entitled to the allegiance and obedience of its citizens, is solemnly bound, in return, to protect, not only their person, but their property. It is said by Vattel (ch. 2, § 17) : "If a nation is obliged to preserve itself, it is no less obliged carefully to preserve all its members. The nation owes this to itself, since the loss even of one of its members weakens it, and is injurious to its preservation. It owes this also to its members in particular, in consequence of the very act of association ; for those who compose a nation, are united for their defence and common advantage ; and none can justly be deprived of this union, and of the advantages he expects to derive from it, while he, on his side, fulfills the conditions. The body of a nation cannot then abandon a province, a town, or even a single individual who is a part of it, unless compelled to do it by necessity, or indispensably obliged to it by the strongest reasons, founded on the public safety."

It is on this duty of protection that the duty of allegiance depends. We owe allegiance to the country where we were born, where we were educated, and under the protection of whose laws we live. To it we owe the sacrifice of our comfort, our property, and our lives,

when the occasion requires it. And it is from the existence of these comprehensive duties on our part, that the reciprocal duty of protection arises. Our country is bound to protect our rights as individuals ; and if this protection be not afforded us, she is bound to render us such an equivalent as it is in her power to bestow. Against another nation she is bound to assert our claims, for she alone can meet such an antagonist on equal terms. If she neglects the sacred duty of protecting us in our rights, she is bound to make us compensation. These principles are not recent discoveries. They are as old as the institution of civil government. Their recognition by a state is the surest and firmest bond by which the citizen is attached to his government and his country. They embody the same idea expressed by the Lord Chancellor in the case of the Baron de Bode, to which we have referred, that " if, from weakness, timidity, or any other cause, on the part of his own government, no redress is obtained from the foreigner, he (the citizen) has a claim against his own country." In the case of Farnam *vs.* Brooks, 9 Pick., p. 239, Parker, C. J., intimates an opinion that there is an obligation on the government of the United States to procure redress for its citizens, or itself to reimburse them.

In relation to the question of damages, no evidence has been laid before us. The sum claimed of Portugal is mentioned in the correspondence, but no proof of the damages sustained appears in the case. Upon this point testimony must be taken.

DISSENTING OPINION DELIVERED BY JUDGE BLIACKFORD.

I dissent from the judgment of the court in this case.

This is a claim against the United States for one hundred and thirty-one thousand, six hundred dollars. The claim is presented by Samuel C. Reid, on behalf of himself and of the owners, officers, and crew of the American privateer General Armstrong.

This privateer, on the 26th and 27th days of September, 1814, during the last war between the United States and Great Britain, was destroyed by certain British ships of war in a harbor of the island of Fayal. The kingdom of Portugal, to which Fayal belonged, was, at the time, a neutral nation; and, consequently, the combat of the belligerents, in which the privateer was destroyed, was a violation of the laws of nations. The commencement of this conflict was between the privateer and a boat or boats of the British ships, in which first encounter there were a few persons killed and some wounded. But the governor of the island knew nothing of these first acts of hostility until after they had occurred. As soon as he was informed of their occurrence, he used every exertion in his power, by peaceable measures, to prevent any further hostile acts by the British, but without success. He did not, to be sure, resort to force; and it is evident, that owing to the want of means, he could not, by force, have prevented the disaster which ensued.

On said 27th of September, 1814, Samuel C. Reid, the captain of the privateer, entered his written protest, in which he charged the British vessels with being the aggressors. This protest is sworn to by the captain, the first and third lieutenants, the sailing master, surgeon, captain of marines, and four prize masters of the brig. There are, also, as to the aggression, the statements of the American consul and of the governor of Fayal. On the other hand, a lieutenant of the British navy, and commander of a barge, engaged in the conflict, together with the master and one of the seamen of the barge, made oath, on said 27th of September, 1814, before the British consul at Fayal, showing, if their statements be true, the privateer to have been the aggressor.

On the 19th of December, 1814, Jenkins & Havens, as agents of those concerned in the privateer, requested the government of the United States to demand of Portugal compensation for the damage sustained by the loss of the vessel.

It appears by a letter of the Portuguese minister of the 22d of

December, 1814, that the Prince Regent of Portugal, upon information of the governor of Fayal, had directed his minister in London to require of the British government "satisfaction and indemnification, not only for his subjects, but for the American privateer, whose security was guaranteed by the safeguard of a neutral port."

On the day after the date of that letter, the Portuguese minister enclosed to Mr. Sumter, the American minister at Rio Janeiro, a copy of the advices received from the governor of Fayal respecting the destruction of the privateer, with a communication, saying: "His royal highness, however, flatters himself that the citizens of the United States will not have reason to complain of the Portuguese governor in that conflict, having used his utmost power to prevent the evil that occurred. The British government refused the indemnification demanded by Portugal for the loss of the privateer, alleging, according to Count Tojal, that the conduct of Commodore Lloyd was fully justified as a mere act of retaliation, provoked by the hostilities previously commenced by Captain Reid.

On the 3d of January, 1815, Mr. Monroe, Secretary of State, instructed Mr. Sumter, the American minister aforesaid, "to bring all the circumstances of the transaction distinctly to the view of the Portuguese government, and to state the claim which the injured party had to immediate indemnification." In December following, Mr. Sumter wrote to Mr. Monroe as follows; "I have not had the good fortune to receive any letter from your department of a later date than that of the 3d of January last, which related solely to the reclamation to be made in favor of the General Armstrong privateer destroyed by the British at Fayal. You will have seen by my note of the first of January, that I had already attended to that affair. Others of a similar kind have been represented since. The only answer I have yet obtained is, that inquiry has been ordered in the other cases; and that a demand of satisfaction had been made in the case of the Armstrong." In 1818, Mr. Adams, Secretary of State, wrote to the Portuguese minister relative to the

claim, concluding his note as follows: "It is hoped your government will, without further delay, grant to the sufferers by that transaction, the full indemnity to which they are, by the laws of nations, entitled." In 1837, Mr. Kavanagh, our chargé d'affaires at Lisbon, in compliance with his instructions, demanded of Portugal satisfaction for said injury.

In 1841, Captain Reid, as agent aforesaid, wrote to Mr. Webster, Secretary of State, informing him that the President had been applied to "concerning their claims upon the Portuguese government, for the entire loss of that vessel," and urging Mr. Webster to assist the claimants. Mr. Webster, accordingly, in January, 1842, instructed Mr. Barrow, our chargé d'affaires at Lisbon, to present the claim to the Minister of Foreign Affairs, which instruction was complied with in May, 1842. The Portuguese minister, in 1843, refused the demand, alleging that the privateer was the aggressor, and that the Portuguese authorities had used every means in their power to prevent the deed. In 1844, the Secretary of State, Mr. Upshur, wrote to Samuel C. Reid, Jr., as follows:

DEPARTMENT OF STATE,
Washington, January 10, 1844.

SIR: At the repeated instance of yourself and others, interested in the case of the privateer General Armstrong, this government has again and again instructed its representatives at Lisbon to bring the claim to the notice of the government of Portugal. This has been done, and every argument has been employed to induce Portugal to acknowledge the justice of the claim, and to make due reparation. All these efforts, of which you are well aware, have proved unavailing, and the Department of State is unwilling, under all the circumstances, to renew the application, having every reason to believe that all future applications will prove as fruitless as those that are past. Argument and importunity have been exhausted, and this government can see nothing in the circumstances to justify or warrant it in having recourse to any other weapons.

I am, sir, your obedient servant,

A. P. UPSHUR,

SAMUEL C. REID, JR., ESQ., New Orleans.

The gentleman, however, to whom the above letter was addressed, endeavored, by his subsequent letters, to persuade our government to continue the negotiation with Portugal. But Mr. Calhoun, the successor of Mr. Upshur in the State Department, took the same view of the subject with Mr. Upshur. In a letter to Mr. Johnson, of Louisiana, Mr. Calhoun says: "The case of the General Armstrong was disposed of by my predecessor upon grounds which appear to me to be judicious and proper. Of this, Mr. Reid has been duly informed; and I can see no good reason, under the circumstances, for renewing the claim, or for continuing a correspondence on the subject."

In 1849, this claim against Portugal was renewed at Lisbon, in pursuance of instructions from Mr. Clayton, Secretary of State, but without success. In April, 1850, on the demand being again made by our government, Portugal offered to refer the matter to arbitration, mentioning the King of Sweden as the arbitrator. The offer was rejected. In July, 1850, another proposition to refer the case to arbitration was made by Portugal. This last proposition was, on the 5th of September of the same year, accepted by Mr. Webster, then Secretary of State. A treaty was accordingly, on the 26th of February, 1851, entered into between the two governments, by which the said claim against Portugal was submitted to the arbitrament of some sovereign, potentate, or chief, of some nation in amity with both the high contracting parties.

The President of the French Republic, Louis Napoleon, was afterwards selected as the arbiter, and he consented to discharge the duty. On the 11th of December, 1852, the arbiter caused to be delivered, at Paris, to the respective ministers of the United States and Portugal, his award in favor of Portugal, as follows:

TRANSLATION OF THE AWARD OF PRESIDENT NAPOLEON, IN THE CASE OF THE "GENERAL ARMSTRONG."

We, Louis Napoleon, President of the French Republic:

The Government of the United States, and that of her Majesty the Queen of Portugal and of the Algarves, having, by the terms of a convention signed

at Washington on the 26th of February, 1851, asked us to pronounce as arbiter upon a claim relative to the American privateer "General Armstrong," which was destroyed in the port of Fayal, on the 27th of September, 1814; after having caused ourself to be correctly and circumstantially informed in regard to the facts which have been the cause of the difference, and after having maturely examined the documents duly signed in the name of the two parties, which have been submitted to our inspection by the representatives of both powers, considering that it is clear, in fact, that the United States were at war with her Britannic Majesty, and her most faithful Majesty preserving her neutrality, the American brig, the "General Armstrong," commanded by Captain Reid, legally provided with letters of marque, and armed for privateering purposes, having sailed from the port of New York, did, on the 26th of September, 1814, cast Anchor in the port of Fayal, one of the Azores Islands, constituting part of her most faithful Majesty's dominions;

That it is equally clear that, on the evening of the same day, an English squadron, commanded by Commodore Lloyd, entered the same port;

That it is no less certain that during the following night, regardless of the rights of sovereignty and neutrality of her most faithful Majesty, a bloody encounter took place between the Americans and the English; and that on the following day, the 27th of September, one of the vessels belonging to the English squadron came to range herself near the American privateer for the purpose of cannonading her; that this demonstration, accompanied by the act, determined Captain Reid, followed by his crew, to abandon his vessel and to destroy her;

Considering that if it be clear that, on the night of the 26th of September, some English long boats, commanded by Lieutenant Robert Fausset, of the British navy, approached the American brig, the "General Armstrong," it is not certain that the men who manned the boats aforesaid, were provided with arms and ammunition;

That it is evident, in fact, from the documents which have been exhibited that the aforesaid long boats, having approached the American brig, the crew of the latter, after having hailed them and summoned them to be off, immediately fired upon them, and that some men were killed on board the English boats, and others wounded—some of whom mortally—without any attempt having been made on the part of the crew of the boats to repel at once force by force;

Considering that the report of the governor of Fayal proves that the American captain did not apply to the Portuguese government for protection until blood had already been shed, and, when the fire had ceased, the

brig "General Armstrong" came to anchor under the castle at a distance of a stone's throw; that said governor states, that it was only then, that he was informed of what was passing in the port; that he did, on several occasions, interpose with Commodore Lloyd, with a view of obtaining a cessation of hostilities, and to complain of the violation of a neutral territory;

That he effectively prevented some American sailors, who were on land, from embarking on board the American brig, for the purpose of prolonging a conflict which was contrary to the law of nations;

That the weakness of the garrison of the island, and the constant dismantling of the forts, by the removal of the guns which guarded them, rendered all armed intervention on his part impossible;

Considering, in this state of things, that Captain Reid, not having applied from the beginning for the intervention of the neutral sovereign, and having had recourse to arms in order to repel an unjust aggression of which he pretended to be the object, has thus failed to respect the neutrality of the territory of the foreign sovereign, and released that sovereign of the obligation in which he was to afford him protection by any other means than that of a pacific intervention;

From which it follows, that the government of her most faithful Majesty cannot be held responsible for the results of the collision which took place in contempt of her rights of sovereignty, in violation of the neutrality of her territory, and without the local officers or lieutenants having been required in proper time, and enabled to grant aid and protection to those having a right to the same;

Therefore, we have decided, and we declare, that the claim presented by the government of the United States against her most faithful Majesty has no foundation, and that no indemnity is due by Portugal in consequence of the loss of the American brig, the "General Armstrong," armed for privateering purposes.

Done and signed by duplicate, under the seal of State, at the palace of the Tuileries, on the thirtieth day of the month of November, in the year of grace one thousand eight hundred and fifty-two.

[L. S.] L. NAPOLEON.

The whole correspondence between the American and Portuguese governments respecting this claim, together with other papers in the case, are printed, and will accompany this opinion.

The question to be decided is, whether, under the circumstances

of the case, the United States are liable to the claimants for the loss occasioned by the destruction of the privateer ?

The claimants contend that they once had a valid claim against Portugal for one hundred and thirty-one thousand six hundred dollar ; that they have lost that claim by the mismanagement of the same by the United States ; and that the United States are therefore bound, by law, to pay them the amount so lost.

The first inquiry to be made is relative to the nature of the demand of the claimants against Portugal.

There is no absolute certainty, from the evidence, as to whether the privateer or the British were the aggressors. The first gun was fired by the privateer, but that firing may have been justifiable in self-defence. Whether it was so or not, is a question upon which there is contradictory evidence. On the part of Portugal, we have the deposition of Lieutenant Fausset, of the British navy, and two of his men, dated the 27th of September, 1814, which, according to a copy furnished by the Portuguese minister, is as follows : " That on Monday, the 26th instant, about eight o'clock in the evening, he was ordered to go in the pinnace or guard-boat, *unarmed*, on board her Majesty's brig Carnation, to know what armed vessel was at anchor in the bay, when Captain Bentham, of said brig, ordered him to inquire of said vessel (which, by information, was said to be a privateer). When said boat came near the privateer, they hailed to say the Americans, and desired the English boat to keep off, or they would fire into her ; upon which Mr. Fausset ordered his men to back astern, and with a boat-hook was in the act of so doing, when the Americans, in the most wanton manner, fired into said English boat, killed two and wounded seven, some of them mortally, and this, notwithstanding said Fausset frequently called out not to murder them ; that they struck and called for quarters ; said Fausset solemnly declared that no resistance of any kind was made, nor could they do it, not having any arms, nor, of course, sent to attack said vessel. Also, several Portuguese boats, at the time of said unprecedented attack, were going ashore, which, it seems, were said to be armed."

On the part of the privateer, we have the protest of Captain Reid and his officers before stated, made and sworn to on said 27th of September, 1814. That protest, after mentioning the privateer's arrival at Fayal soon after noon of the previous day, says : "That during the said afternoon his crew were employed in taking on board water, when about sunset of the same day, the British brig of war Carnation, Captain Bentham, appeared suddenly doubling round the northeast point of this port. She was immediately followed by the British ship Rota, of thirty-eight guns, Captain P. Somerville, and the seventy-four gun ship Plantagenet, Captain Robert Lloyd, which latter, it is understood, commanded the squadron. They all anchored about seven o'clock, P. M. and soon after some some suspicious movements on their part, indicating an intention to violate the neutrality of the port, induced Captain Reid to order his brig to be warped in shore, close under the guns of the castle ; that in the act of doing so, four boats approached his vessel filled with armed men. Captain Reid repeatedly hailed them, and warned them to keep off ; which they disregarding, he ordered his men to fire on them, which was done, and killed and wounded several men. The boats returned the fire, and killed one man and wounded the first lieutenant ; they then fled to their ships and prepared for a second and more formidable attack. The American brig, in the mean time, was placed within half a cable's length of the shore, and within half a pistol shot of the castle. Soon after midnight, twelve, or, as some state, fourteen boats, supposed to contain nearly four hundred men, with small cannon, swivels, blunderbusses, and other arms, made a violent attack on said brig, when a severe conflict ensued, which lasted near forty minutes, and terminated in the total defeat and partial destruction of the boats, with an immense slaughter on the part of the British. The loss of the Americans in the actions was, one lieutenant and one seaman killed, and two lieutenants and five seamen wounded. At daybreak the brig Carnation was brought close in, and began a heavy cannonade on the American brig, when Captain Reid, finding further resistance unavailing, abandoned the vessel,

after partially destroying her, and soon after the British set her on fire."

The American consul at Fayal, in his note of September 26, 1814, to the governor of the Azores, says: "In violation of the neutrality which his royal highness, the Prince Regent, has promised to observe towards the United States of America and England in the present war, the ships of war of his Britannic Majesty, now lying in this port, lately ordered four or five armed boats to surprise and carry off the American armed schooner General Armstrong, which is lying here under the guns of the castle, on the protection of which she regarded herself absolutely in security. The boats were repulsed, but a new and more formidable attack is now feared." A relation of the conflict, similar to that given in Captain Reid's protest, is given by the governor of the Azores, but as he was not present at the commencement, he could only speak from information as to that part of it. The Portuguese minister then at Rio Janeiro, considered, from information received from the said governor, that the British were the aggressors, and in his letter on the subject to the British minister, in December, 1814, he denounced the conduct of the British commander in very strong terms.

It appears to me, from an examination of the evidence of those persons having any personal knowledge of the affair, which evidence is contradictory, and none of which is impeached, that the question of fact in controversy as to whether the privateer or the British ships were the aggressors, was a fair one for negotiation between the United States and Portugal, and to be referred, if they could not agree, to some proper tribunal for adjudication.

There is another inquiry relative to the demand of the claimants against Portugal, and that is, whether, supposing the British vessels to have been the aggressors, the laws of nations rendered Portugal liable for the loss of the privateer?

Had the privateer, instead of being destroyed, been captured only by the British, and had afterwards come into the possession of Portugal, there is no doubt but that Portugal would have been

bound to restore the vessel to the original owners ; nor is there any doubt but that the governor of Fayal, if he had had the power, would have been bound to endeavor, by force, to prevent the disaster. But the difficulty as to these matters is, that the privateer having been destroyed could not be restored, and that the governor had no means by which he could have prevented, by force, the destruction of the privateer. The above stated question therefore, whether, supposing the British to have been the aggressors, Portugal was liable, by the laws of nations, to pay for the privateer, is not entirely free from doubt. And the cause of the doubt is, that the privateer was never in the possession of Portugal, and there was no neglect of duty by the governor of Fayal. Chancellor Kent, in one part of his Commentaries, says : "It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it, and if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution."—1 Kent's Com., 117. But on a subsequent page his language is as follows : "A neutral has no right to inquire into the validity of a capture, except in cases in which the rights of neutral jurisdiction were violated ; and in such cases, the neutral power will restore the property, if found in the hand of the offender, and within its jurisdiction, regardless of any sentence of condemnation by a court of a belligerent captor. It belongs solely to the neutral government to raise the objection to a capture and title, founded on the violation of neutral rights. The adverse belligerent has no right to complain when the prize is duly libelled before a competent court. If any complaint is to be made on the part of the captured, it must be by his government to the neutral government, for a fraudulent, or unworthy, or unnecessary submission to a violation of its territory ; and such submission will naturally provoke retaliation." (1 Kent's Com., 121.) If this last-cited passage from Kent be the law, Portugal was not liable, because it is certain that the governor of Fayal did not submit to the outrage fraudulently, or unworthily, or unnecessarily. But, on the

contrary, he endeavored, as soon as he had notice of the hostile acts, to prevent, by peaceable means, the further violation of the neutrality of the port; and he had no other means by which it could be prevented. Wheaton's language is as follows: "Where a capture of enemy's property is made within neutral territory, or by armaments unlawfully fitted out within the same, it is the right as well as the duty of the neutral State, where the property thus taken comes into its possession, to restore it to the original owners. (Wheaton's International Law, 494) This doctrine of Wheaton agrees with that laid down by Kent in the passage last above cited from his Commentaries. Kent there says, that in cases in which the rights of neutral jurisdiction are violated, "the neutral power will restore the property, if found in the hands of the offender and within its jurisdiction." This doctrine of these eminent American authors is decidedly in favor of Portugal; for if her liability depended on her having possession of the privateer, she certainly was not liable, the vessel having been destroyed by the British ships.

The question respecting the liability of Portugal under the circumstances of the case, does not appear to be settled by foreign writers on the laws of nations. Bynkershoek may be considered to be against the Portuguese side of the question. (Bynkershoek on the Law of War, 59, 60.) But Kluber, who is a much later writer, is in favor of Portugal. This last named author says: "That the neutral is not to allow, voluntarily, that either of the belligerent parties shall commit, upon its neutral territory, either continental or maritime, any hostile acts." (Kluber's Law of Nations, page 86, section 284.) Portugal was not accountable for the outrage, according to the authority of Kluber, because it is clear that the governor of Fayal did not allow, *voluntarily*, the breach of the neutrality of the port. This doctrine of Kluber is substantially the same with that of Kent last referred to; the latter author saying, that the complaint against the neutral government must be for "a fraudulent, or unworthy, or unnecessary

submission to a violation of territory." That there was no such submission in this case, is shown by the correspondence between the governor and the British commander during the night of the 26th of September aforesaid. Indeed, Captain Reid's protest confines his complaint to the *inability of Portugal*. That protest says: "And the said Captain Reid also protests against the government of Portugal, for their inability to protect and defend the neutrality of this their port and harbor."

It appears to me, therefore, that the question of public law involved in the present case, as well as the question of fact before referred to, was a very proper subject to be submitted by the governments of the United States and Portugal to arbitration.

The questions mentioned above were exceedingly important. Not only a large amount of money depended upon the result, but, what is of infinitely higher concern, the honor of two independent nations was involved in the controversy. Those questions, both of fact and of law, had been the subjects of negotiation for more than thirty years previously to 1851, when the treaty between the two governments was entered into submitting the controversy to arbitration, which resulted in an award, by the President of the French republic, against the validity of the claim.

In consequence of that award, the claimants have abandoned their claim against Portugal; but they now turn round and demand the amount, namely, one hundred and thirty-one thousand six hundred dollars against the United States. The ground of this demand is, that the Secretaries of State, and the President and Senate of the United States, have lost, by mismanagement, the claim against Portugal, and have thus made their own government liable for the amount. There are several charges of mismanagement insisted on, which will be particularly noticed.

One of the charges, which is that of neglect in the negotiation, admits of a short answer. The delay which occurred, from the time the claim was presented soon after it originated, till 1837, is accounted for by the disordered state of the government of Portugal during

that period. The Secretary of State, Mr. McLean, in 1834, gives the unsettled political affairs of Portugal as a reason for not then insisting on the claim. The claimants, in their argument, made part of their memorial to Congress, in 1854, says ; "These delays were occasioned, as will appear by the correspondence, by the peculiar condition of the government of Portugal, and the indisposition of the American government to urge this claim on her, until that government should be placed in a better situation, and under better auspices; but the owners have never failed to make continual claim," etc. The American chargé d'affaires at Lisbon, gives to the Portuguese minister, in 1850, the following reason for the non-presentation of the claim between 1815 and 1837, namely: "The disinclination of the government of the United States to urge the claim upon Portugal, convulsed, as she almost continually was, by intestine difficulties."

Another charge of mismanagement of the claim, relates to the submission to arbitration.

The claimants say that our government received a *bonus* from Portugal as a consideration for referring the case. This objection must depend upon the face of the treaty. That was made, on the part of our government, by the President and Senate. It was by the treaty alone that the case was referred. The treaty commences as follows: "The United States of America and Her Most Faithful Majesty, the Queen of Portugal and of the Algarves, equally animated with the desire to maintain the relations of harmony and amity which have always existed, and which it is desirable to preserve between the two Powers, having agreed to terminate, by a convention, the pending questions between their respective governments, in relation to certain pecuniary claims of American citizens, presented by the government of the United States against the government of Portugal, have appointed as their plenipotentiaries for that purpose," etc. The first article is as follows : "Her Most Faithful Majesty, the Queen of Portugal and of the Algarves, appreciating the difficulty of the two governments agreeing upon the subject of said claims, from the

difference of opinion entertained by them respectively, which difficulty might hazard the continuance of the good understanding now prevailing between them, and resolved to maintain the same unimpaired, has assented to pay to the government of the United States a sum equivalent to the indemnities claimed for several American citizens (with the exception of that mentioned in the fourth article,) and which sum the government of the United States undertakes to receive in full satisfaction of said claims, except as aforesaid, and to distribute the same among the claimants." The second and third articles merely provide for the submission to arbitration of the case of the brig General Armstrong. The fourth article is as follows; "The pecuniary indemnities which Her Most Faithful Majesty promises to pay, or cause to be paid, for all the claims presented previous to the 6th day of July, 1850, in behalf of the American citizens, by the government of the United States (with the exception of that of the General Armstrong,) are fixed at ninety-one thousand seven hundred and twenty-seven dollars, in accordance with the correspondence between the two governments." The other articles have no bearing on the question. There is surely nothing in this treaty to support, in the slightest degree, the idea that the submission of the case, by the President and Senate, was in consideration of a *bonus*, or for any other purpose than that of having the claim properly and legally investigated and determined. The treaty provides for the payment of all the other claims except that of the General Armstrong, and refers that claim to arbitration; and that is the whole of the treaty as regards the submission. It is unnecessary, surely, to notice any further this extraordinary charge against the treaty-making power of the United States.

Another charge is, that our government had no authority to submit the case to arbitration, without consulting the claimants. This position is untenable. When the government, at the request of the claimants, consented to make a demand on Portugal for the alleged claim, the controversy became one between government and government, which might, if the governments chose, be referred to arbitra-

tion. The law of nations on this subject is stated by Mr. Wildman to be as follows:

"The only pacific modes of settling differences, which cannot be adjusted by negotiation, are arbitration and reprisal. First, with respect to arbitration: An arbitrator is a person authorized by the parties in difference, to decide what shall be done with regard to the matters submitted to his judgment. Where the award of an arbitrator is final, and confined to the terms of the submission, it is conclusive, unless it has been made in collusion with one of the parties. —Puffendorf, book 5, chap. 13; Vattel, book 2, sec. 329. For there is no superior authority by which the validity of such an award can be examined, and consequently it is binding, although it be unjust.—Grotius, book 3, chap. 20, sec. 46; Puffendorf, ibid."—1 Wildman's International Law, p. 186, chap. 5.

It is certain, therefore, that the submission to arbitration of the controversy, relative to the claim against Portugal, was in strict accordance with the laws of nations. The idea that the government was not authorized to refer the case to a third power, without consulting the claimants, is not well-founded. The correct view of this matter, is that as soon as our government was induced by the claimants to interfere, the controversy became an affair of state, to be treated of between the two governments as other differences between nations are treated—that is to say, by negotiation, and such other modes as are recognized by the laws of nations. But, further it appears that the claimants acquiesced in the reference. The present Secretary of State, Mr Marcy, in his letter of 1854, to the chairman of Foreign Relation, says: "From an examination of the files of the department, it appears that, pending the negotiations which terminated in the convention with Portugal of 1851, two letters were addressed to the Secretary of State, on the subject of the reference of the Armstrong claim to the arbitration of a third Power: one dated August 26, 1850, by S. C. Reid, 'late commander of the privateer General Armstrong,' and the other dated September 5, 1850, by S. C. Reid, jr., 'sole and only authorized agent

of the claimants ' to the case. Copies of these letters, and of the replies thereto, are herewith enclosed. There are several other letters from the last-named gentleman on the same subject, and of subsequent dates, among the files of the department, from which it would appear that the claimants in the case had acquiesced in the decision of their government to agree to refer their claim to arbitrament. If a different opinion was entertained by them, it is at least certain that their authorized agent did not, in any letters to this department, protest against that decision, or intimate doubts as to its propriety or expediency." Those statements of the Secretary seem to be, at all events, a full answer to this charge.

Another charge of mismanagement is the refusal of the Secretary of State, Mr. Webster, to forward to the arbiter a written argument of the claimants.

The treaty between the two governments, by which the case was referred, contains the following article :

" ART. 3.—So soon as the consent of the sovereign, potentate, or chief of some friendly nation, who shall be chosen by the two high contracting parties, shall have been obtained to act as arbiter in the aforesaid case of the privateer brig General Armstrong, copies of all correspondence, which has passed in reference to said claim between the two governments and their respective representatives, shall be laid before the arbiter, to whose decision the two high contracting parties hereby bind themselves to submit."

It appears to me that this language of the treaty shows that the arbiter was to determine the case upon the correspondence which had taken place on the subject between the two governments. That correspondence had been very extensive, and had been conducted with great ability on both sides. The questions of fact and of law belonging to the case had been fully investigated by the gentlemen to whom the business was confided. It would seem to have been proper, under those circumstances, for the parties to submit the cause to the arbiter upon the correspondence, without further argument by either of them. The claimants had no additional evidence to furnish. It is proper,

also, to add, that if, as the claimants contend, Mr. Webster's refusal to forward the argument was improper, he was guilty of a wrong to the claimants. Now the law is settled, that for any such wrong by a public officer, the government is not liable to the individual injured. The language of Judge Story on this subject is as follows : "In the next place, as to the liability of public agents for torts or wrongs done in the course of their agency, it is plain that the government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service ; for it does not undertake to guaranty to any persons the fidelity of any of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests ; and, indeed, laches are never imputable to the government."—Story on Agency, section 319.

To place this charge in its true light, I must borrow the argument of an eminent statesman. Mr. Webster, in his refusal to forward the argument, was either right or wrong. If Mr. Webster was right, then there is an end of the charge. If Mr. Webster was wrong, then there is an end of the charge also ; because the government is not liable for the wrong of a public officer in his action respecting a private claim. So that whether Mr. Webster was right or wrong, there is no ground for the charge.

The claimants make one more charge of mismanagement of their claim, namely, that the award should have been rejected as not being within the terms of the submission.

The claimants say that the arbiter has decided on the facts of the case, when he was only authorized to decide a question of law. The second article of the treaty referring the case is as follows :

"The high contracting parties not being able to come to an agreement upon the question of public law involved in the case of the American privateer brig General Armstrong, destroyed by British vessels in the waters of the island of Fayal, in September, 1814, Her Most Faithful Majesty has proposed, and the United

States of America have consented, that the claim presented by the American government in behalf of the captain, officers, and crew, of the said privateer, should be submitted to the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties." The third article (hereinbefore copied) contains the following provision: "Copies of all correspondence which has passed, in reference to said claim, between the two governments and their respective representatives, shall be laid before the arbiter, to whose decision the two high contracting parties hereby bind themselves to submit." The second article commences by saying, that the parties disagreed respecting the question of public law; but when the article comes to state the agreement to submit, it says, that Her Most Faithful Majesty has proposed, and the United States of America have consented, that the claim presented by the American government in behalf, etc., should be submitted to the arbitrament, etc.; and the third article, in order to enable the arbiter to determine the merits of the claim, directs that copies of all the correspondence, in reference to the claim, should be laid before him. It seems, therefore, to be very clear that the merits of the claim, that is, both the facts and law, were submitted to the arbiter, and were to be decided by him.

The consequence is, that the award, which is in favor of Portugal upon the facts that the case and the law applicable to them as they were understood by the arbiter, must be considered to be within the submission, and to have been rightly accepted by the government.

I have now examined all the charges made by the claimants against the United States as to the management of the claim, and have come to the conclusion that none of them are sustainable.

But there is another and more enlarged view of this case, which it is proper to notice. This view is presented by the following letters of instruction from Mr. Forsyth, as Secretary of State, to Mr. Kavanagh, our chargé d'affaires at Lisbon, in regard to the present claim:

DEPARTMENT OF STATE,
Washington, October 22, 1835.

SIR: In a dispatch addressed to you on the 20th of May last (No. 4), your attention was called to a claim of the owners, officers, and crew of the American privateer General Armstrong, which was captured and destroyed by a British fleet in the port of Fayal, during the last war between the United States and Great Britain; and you were informed that Captain Reid, who represented himself to be the agent of the parties concerned, would be requested to transmit to you the necessary documents to establish the claim, and to show the amount of damages to which the persons interested were entitled. Permission having been granted to Captain Reid to forward those documents through the department, the enclosed papers have just been received from him, and are transmitted to you without examination. The department is not to be understood, therefore, as expressing any opinion in respect to their sufficiency for the purpose for which they are designed, or as to the amount of the claim which you are to make upon the Portuguese government. It is not thought necessary to add anything to the instructions which have heretofore been given to you upon the subject.

I am, sir, your obedient servant,

JOHN FORSYTH.

[*Extract.*]
DEPARTMENT OF STATE,
Washington, September 21, 1836.

SIR: * * * * * * *

It is not necessary that you should wait for any further opinion of the department upon the claim of the owners, officers, and crew of the privateer General Armstrong. You have already been instructed as to the general character of this claim, and the principle upon which it is founded. You will make the best use of such testimony as has been furnished you by the claimants in its support; and as it is well understood that, after asking the interference of their government to procure redress for the injuries they supposed themselves to have sustained, the parties must abide by such settlements as that government may make, you will, after a careful examination of the evidence, demand from the Portuguese authorities the highest amount of damages which, in your judgment, a prudent and conscientious man would feel himself justified in asking, were he prosecuting his own claim. * * * *

I am, sir, your obedient servant,

JOHN FORSYTH.

The doctrine of this last letter of Mr. Forsyth's is similar to that stated by Mr. Adams, as Secretary of State, in 1823. The following is Mr. Adams's language: "But unacknowledged, unsettled, unliquidated claims form the natural subject of negotiation, and of all negotiation the necessary and essential character is compromise. Of such claims, whether originating in contract or in wrong, the very application of an individual to one government to assist him in the enforcement of his claims upon another, imports, of itself, the consciousness that he cannot obtain his claims without that assistance, and makes them at once a subject of negotiation and compromise." House Rep. 1 vol., 1 sess. 33d Congress.

I consider when, at the request of a claimant on a foreign nation, our government, without consideration, assents to interfere in his behalf, its action may be by negotiation, compromise, arbitration, or even by reprisals or war. But in the adoption of any such measure, the government, by the understanding of the parties, and by the laws of nations, exercises its own judgment and discretion. The claim thus in the possession of the government, becomes a national one, to be attended to as other claims of the nation are attended to. The government on such occasions acts, not as an agent of the claimants, but in its sovereign capacity, and with a view not merely to the individual interest of the claimant, but to the general welfare of the nation. It frequently happens where a number of citizens of one nation have claims on another nation, and solicit the interference of their own government, that a treaty is entered into between the two nations, by which the claims are discharged on the payment of a certain sum to be distributed among the claimants. If that sum prove insufficient, the claimants must bear the loss. The case is one of compromise, and the claimants must abide by it. See the communication of Mr. Adams above referred to. The judgment and discretion of our government in the present case, were exercised by the President and Senate in referring, by a treaty with Portugal, the claim in question to the arbitrament of the President of the French republic, and by the executive department in its negotiations with

the Portuguese authorities before and after the submission. This exercise of judgment and discretion by the treaty-making power, and by the executive department, was political in its nature, and is entirely independent of the judiciary. The result was an award of the arbitor, upon the merits, in favor of Portugal. That award must be considered final and conclusive. Grotius, as to the effect of such an award, says : "Although the civil law may decide upon the conduct of such arbitrators, to whom a compromise is referred, so as to allow an appeal from their decision, or complaints against their injustice ; this can never take place between kings and nations. For here there is no superior power that can either rivet or relax the bonds of an engagement. The decree, therefore, of such arbiter must be final and without appeal."—Grotius, book 3, ch. 20. The claimants admit that the award is conclusive as regards Portugal. That admission is intended as a justification for their now charging the United States instead of Portugal ; but there is no reason for the charge. Our government never had any concern in the claim, except that, to oblige the claimants, and on their repeated and urgent solicitations, it made great efforts for many years to obtain for them from Portugal the amount they claimed. These efforts failed of success only because the claimants did not furnish sufficient evidence to satisfy the arbitrator that their claims were valid. That being the case, I know of no ground upon which the United States can be considered liable for the claim in a court of justice, governed, as this court is, by legal principles. The bravery of the officers and crew of the privateer in the conflict at Fayal cannot be too highly admired. For their valor on that occasion, they received from Congress, in 1834, an appropriation, as prize money, of ten thousand dollars. For any other compensation, to which the present claimants may believe themselves entitled, they must rely, in my opinion, not upon any legal right, but upon the liberality of Congress.

For the above reasons, I dissent from the judgment of the majority of the court in this case.

APPENDIX.

To Captain S. C. Reid, commander of the private armed brig of war called the General Armstrong.

INSTRUCTIONS FOR THE PRIVATE ARMED VESSELS OF THE UNITED STATES.

1. The tenor of your commission under the act of Congress, entitled "An act concerning letters of marque, prizes, and prize goods," a copy of which is hereto annexed, will be kept constantly in your view. The high seas, referred to in your commission, you will understand, generally, to extend to low water mark; but with the exception of the space within one league, or three miles, from the shore of countries at peace both with Great Britain and with the United States. You may, nevertheless, execute your commission within that distance of the shore of a nation at war with Great Britain, and even on the waters within the jurisdiction of such nation, if permitted so to do.

2. You are to pay the strictest regard to the rights of neutral powers, and the usages of civilized nations; and in all your proceedings towards neutral vessels, you are to give them as little molestation or interruption as will consist with the right of ascertaining their neutral character, and of detaining and bringing them in for regular adjudication, in the proper cases. You are particularly to avoid even the appearance of using force or seduction, with a view to deprive such vessels of their crews, or of their passengers, other than persons in the military service of the enemy.

3. Towards enemy vessels and their crews, you are to proceed, in exercising the rights of war, with all the justice and humanity which characterize the nation of which you are members.

4. The master and one or more of the principal persons belonging to captured vessels, are to be sent, as soon after the capture as maybe, to the judge or judges of the proper court in the United States, to be examined upon oath, touching the interest or property of the captured vessel and her lading: and at the same time are to be delivered to the judge or judges, all passes, charter parties, bills of lading, invoices, letters and other documents and writings found on board; the said papers to be proved by the affidavit of the commander of the capturing vessel, or some other person present at the capture, to be produced as they were received, without fraud, addition, subduction or embezzlement.

By command of the President of the U. S. of America.

JAMES MONROE, *Secretary of State.*

LETTER OF INSTRUCTIONS FROM MESSRS. JENKINS & HAVENS, AGENTS, TO CAPT. SAMUEL C. REID.

(Copy) NEW YORK, 3*d Sept.*, 1814.

CAPT. SAMUEL C. REID:

The private armed brig of war General Armstrong under your command, being now ready for a cruise, it becomes necessary for us to furnish instructions thereto—in doing this, we do not mean to debar you the privilege of exercising your discretion in the choice of a station, but we recommend, as in our opinion being the most likely of affording objects for enterprise and profit, that you stretch off to Madeira, where you will be most likely to intercept the Brazil convoys, and should you be successful in falling in with vessels, finish your cruise there. If, on the contrary, you cannot succeed in capturing vessels enough, and of sufficient value to man, we would recommend you to go through the Cape de Verde Islands and fill up your water, and from thence on the coast of Brazil. The prizes you may order for the United States, we think will be best to be ordered direct for New York or Wilmington, and in the event of their safe arrival at any port in the United States, you will direct them to write to us immediately on arrival, that we may send on a confidential person to take charge of the property, in preference to appointing agents at different places.

On your return to the United States, should you have any prisoners on board, take care to secure them until they are delivered to the proper

officer in order to obtain the bounty. Hoping that your cruise may terminate successfully and honorably to yourself, officers, and crew, and your country, we are

Your assured friends,

(Signed) JENKINS & HAVENS, *Agents.*

P. S.—Be very particular in strictly prohibiting any plunder or depredations on neutrals or other vessels.

CONVENTION FOR THE PAYMENT AND SETTLEMENT OF CERTAIN CLAIMS OF AMERICAN CITIZENS AGAINST PORTUGAL,

BETWEEN

THE UNITED STATES OF AMERICA AND THE QUEEN OF PORTUGAL.

A PROCLAMATION.

WHEREAS a Convention between the United States of America and Her Most Faithful Majesty the Queen of Portugal and of the Algarves, was concluded and signed by their Plenipotentiaries, on the twenty-sixth day of February, in the year of our Lord one thousand eight hundred and fifty-one, which Convention, being in the English and Portuguese languages, is word for word as follows:

The United States of America and Her Most Faithful Majesty, the Queen of Portugal and of the Algarves, equally animated with the desire to maintain the relations of harmony and amity which have always existed, and which it is desirable to preserve between the two Powers, having agreed to terminate, by a Convention, the pending questions between their respective Governments, in relation to certain pecuniary claims of American citizens, presented by the Government of the United States against the Government of Portugal, have appointed as their Plenipotentiaries for that purpose, to wit:

The President of the United States of America, Daniel Webster, Secretary of State of said United States, and

Her Most Faithful Majesty, J. C. de Figanière é Morao, of Her Council, Knight Commander of the Orders of Christ, and of O. L. of Conception of Villa Viçoza and Minister Resident of Portugal near the Government of the United States—

Who, after having exchanged their respective full powers, found to be in due and proper form, have agreed upon and concluded the following articles:

ARTICLE I.

Her Most Faithful Majesty, the Queen of Portugal and of the Algarves, appreciating the difficulty of the two Governments agreeing upon the subject of said claims, from the difference of opinion entertained by them respectively, which difficulty might hazard the continuance of the good understanding now prevailing between them, and resolved to maintain the same unimpared, has assented to pay to the Government of the United States a sum equivalent to the indemnities claimed for several American citizens (with the exception of that mentioned in the fourth article) and which sum the Government of the United States undertakes to receive in full satisfaction of said claims, except as aforesaid, and to distribute the same among the claimants.

ARTICLE II.

The high contracting parties, not being able to come to an agreement upon the question of public law involving in the case of the American privateer brig "General Armstrong," destroyed by British vessels in the waters of the Island of Fayal in September, 1814, Her Most Faithful Majesty has proposed, and the United States of America have consented, that the claim presented by the American Government in behalf of the captain, officers, and crew of the said privateer, should be submitted to the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties.

ARTICLE III.

So soon as the consent of the sovereign, potentate, or chief of some friendly nation, who shall be chosen by the two high contracting parties, shall have been obtained to act as arbiter in the aforesaid case of the privateer brig "General Armstrong," copies of all correspondence which has passed in reference to said claim between the two Governments and their respective representatives, shall be laid before the arbiter, to whose decision the two high contracting parties hereby bind themselves to submit.

ARTICLE IV.

The pecuniary indemnities which Her Most Faithful Majesty promises to pay, or cause to be paid, for all the claims presented previous to the 6th day of July, 1850, in behalf of American citizens, by the Government of the United States (with the exception of that of the "General Armstrong,") are fixed at ninety-one thousand seven hundred and twenty-seven dollars, in accordance with the correspondence between the two Governments.

ARTICLE V.

The payment of the sum stipulated in the preceding article shall be made in Lisbon in ten equal installments, in the course of five years, to the properly-authorized agent of the United States. The first installment of nine thousand one hundred and seventy-two dollars, seventy cents, with interest, as hereinafter provided, (or its equivalent in Portuguese current money) shall be paid, as aforesaid, on the 30th day of September of the current year of 1851, or earlier, at the option of the Portuguese Government; and at the end of every subsequent six months a like installment shall be paid; the integral sum of ninety-one thousand seven hundred and twenty-seven dollars, or its equivalent, thus to be satisfied on or before the thirtieth day of September, 1856.

ARTICLE VI.

It is hereby agreed that each and all of the said installments are to bear, and to be paid with, an interest of six per cent. per annum, from the date of the exchange of the ratifications of the present Convention.

ARTICLE VII.

This Convention shall be approved and ratified, and the ratifications shall be exchanged in the city of Lisbon within four months after the date thereof, or sooner if possible.

In testimony whereof, the respective Plenipotentiaries have signed the same, and affixed thereto the seals of their arms.

Done in the city of Washington, D. C., the twenty-sixth day of February, of the year of our Lord one thousand eight hundred and fifty-one.

[L. S.] DAN'L WEBSTER,

[L. S.] J. C. DE FIGANIÈRE É MORAO.

And whereas the said Convention has been duly ratified on both parts, and the respective ratifications of the same were exchanged at Lisbon on the twenty-third day of June, in the year of our Lord one thousand eight hundred and fifty-one, by Charles B. Haddock, Chargé d'Affaires of the United States near the Government of Her Most Faithful Majesty, and Antonio Aluizo Jervis d' Atouguia, Minister of State for Foreign Affairs of her said Majesty, on the part of their respective Governments;

Now, therefore, be it known, that I, Millard Fillmore, President of the United States of America, have caused the said Convention to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof. In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington this first day of September, in
[L. S.] the year of our Lord one thousand eight hundred and fifty-one, and in the seventy-sixth year of the Independence of the United States.

MILLARD FILLMORE.

By the President:

WM. S. DERRICK, *Acting Secretary of State.*

Concluded 26th February, 1851. *Ratified 10th March*, 1851. *Ratification Exchanged 23d June*, 1851. *Proclaimed 1st September*, 1851.

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES,

COMMUNICATING,

*In compliance with a resolution of the Senate, the Award of the Emperor of France in the case of Brig General Armstrong.**

JANUARY 24, 1853.—Ordered to lie on the table, and be printed.

To the Senate of the United States:—

In answer to the resolution of the Senate of the 14th instant, relative to the award of the Emperor Louis Napoleon, of France, in the case of the brig General Armstrong, I transmit a report from the Secretary of State and the documents by which it was accompanied.

MILLARD FILLMORE.

WASHINGTON, *January 24*, 1853.

* Ex. Doc. of Sen. No. 24, 2 Sess. 32 Congress.

DEPARTMENT OF STATE.
WASHINGTON, *January* 21, 1853.

SIR: The Secretary of State, to whom has been referred the resolution of the Senate of the 14th instant, requesting the President to "communicate to the Senate, if not incompatible with the public interest, the award of the Emperor Louis Napoleon, of France, upon the claim of the owners of the brig General Armstrong against the government of Portugal, together with any correspondence upon that subject not heretofore communicated to Congress" has the honor to lay before the President a copy of a dispatch of the 13th ultimo, addressed to this department by Mr. Rives, the United States Minister at Paris, and also a translation of the award of the Emperor of France, to which it refers.

Respectfully submitted:

EDWARD EVERETT.

To the PRESIDENT OF THE UNITED STATES.

Mr. Rives to Mr. Everett.

LEGATION OF THE UNITED STATES.
PARIS, *December* 13, 1852.

SIR: I enclose herewith the copy of a letter addressed to me by the Minister of Foreign Affairs, on the 10th instant, together with a copy of my answer. In pursuance of the request of the Minister, and the terms of my answer, I called at the Department of Foreign Affairs, on the 11th instant, at the hour named, and found the Minister of Portugal already there. The Minister of Foreign Affairs was absent at the moment of our arrival, having been sent for by the Emperor: but returning soon afterwards, he immediately invited us into his cabinet.

He commenced the interview by repeating what he had already said to me, and which I reported to you in my last dispatch, that the President of the republic was so incessantly occupied by the many and important questions incident to the late change of government here, that it was entirely out of his power to invite us to call upon him before the consummation of that change, as he intended to do, in order that he might deliver to us personally his award in the case of the "General Armstrong." The Minister then proceeded to say that, as, in the present state of things, the Emperor could not regularly invite us to an audience, as we had not yet received our new letters of credence, he had deemed

it proper, rather than incur any farther delay, to depute him, the Minister of Foreign Affairs, to deliver to us, in his name, the award pronounced by him, as President of the republic, in the case submitted to his arbitrament by our respective governments. Having in my answer to the note of the Minister of Foreign Affairs, stated that, under existing circumstances, I had no power but to transmit the document in question to my government, I thought it proper simply to repeat that remark.

The Minister of Foreign Affairs then handed to me the document which I have now the honor to transmit to you, signed by the President of the republic on the 30th day of November last, as his award in the case of the "General Armstrong," placing a similar one, at the same time, in the hands of the Minister of Portugal.

It may not be improper for me to add that I had never received from any quarter any intimation of the nature of the decision rendered; nor did the Minister of Foreign Affairs, in the interview above mentioned, make the slightest allusion to its bearing on the one side or the other. He only said, in general terms, that the President had examined the whole subject with great care and attention, and with an earnest desire to render justice to both parties, according to the facts and principles involved in the controversy.

I have the honor to be, with great respect, your most obedient servant,

W. C. RIVES.

[Translation.]

Mr. Drouyn de L'Huys to Mr. Rives.

DEPARTMENT OF FOREIGN AFFAIRS,
PARIS, *November*, 29, 1852.

SIR: I have the honor to inform you that the arbitral decision asked of the Prince President by the government of the United States, and that of her most faithful Majesty, upon the claim relative to the American privateer, the "General Armstrong," has just been rendered, and that the Prince President will immediately invite you to wait on him, in order to deliver to you, at the same time with the Minister of Portugal, the document containing the decision.

I avail myself of this occasion to renew to you the assurance of the high consideration with which I have the honor to remain, sir, your very humble and obedient servant,

DROUYN DE L'HUYS.

[Translation.]

Mr. Drouyn de L'Huys to Mr. Rives.

DEPARTMENT OF FOREIGN AFFAIRS.
Paris, December 10th, 1852.

SIR: I had the honor of apprising you, under date of the 29th of last month, that the arbitral decision relative to the American privateer "General Armstrong," had just been rendered. I informed you, at the same time, that you would immediately receive the document containing said decision.

Circumstances not having permitted the Emperor to invite you to wait on him as he had intended, he has done me the honor of deputing me to deliver, in his name, to the representatives of the two nations interested in the matter, the two documents destined for their respective governments.

Such is the object which prompts me to request, sir, that you will have the kindness to call at the Department of Foreign Affairs on Saturday next, at three o'clock, if that day suits your convenience.

You will find in my cabinet the minister of Portugal, whom I have invited to be present at this interview, and I will have the honor of delivering into your hands, respectively, the decision rendered on the subject of the difference which has existed between the government of the United States of America and that of her most faithful Majesty.

I avail myself of this occasion to renew to you the assurance of the high consideration with which I have the honor to remain, sir, your very humble and obedient servant,

DROUYN DE L'HUYS.

Mr. Rives to Mr. Drouyn de L'Huys.

LEGATION OF THE UNITED STATES,
Paris, December 11th, 1852.

MONSIEUR LE MINISTRE: I had the honor to receive the note which your excellency addressed to me, under the date of the 29th ultimo, informing me that the Prince President of the republic would invite me immediately to wait on him, that he might deliver to me, at the same time with the Minister of Portugal, the decision rendered by him in the case of the

privateer "General Armstrong," submitted to his arbitrament by the governments of the United States and of Portugal. In consequence of your excellency's communication, I held myself constantly ready, as I had the honor to inform your excellency, to obey the invitation of which you gave me notice the moment it should be received.

I have now the honor to acknowledge the receipt of your excellency's note of yesterday, informing me that circumstances not having permitted the invitation to be addressed to me, of which you gave me notice by your communication of the 29th ultimo, the Emperor had designated you to deliver, in his name, to the representatives of the United States and Portugal, the two acts destined for their respective governments, and requesting me to come to the Department of Foreign Affairs at three o'clock to-day, to receive that intended for the government of the United States.

I will do myself the honor, in conformity to your excellency's request, to call at the Department of Foreign Affairs to-day, at the hour named by you, to receive for transmission to my government, having no other authority in the matter under existing circumstances, the important document you propose to put into my hands to be communicated to it.

I have the honor to be, with sentiments of high consideration, your excellency's most obedient servant,

W. C. Rives.

TRANSLATION OF THE AWARD OF PRESIDENT NAPOLEON IN THE CASE OF THE "GENERAL ARMSTRONG."

We, Louis Napoleon, President of the French Republic:

The Government of the United States, and that of her majesty the Queen of Portugal and of the Algarves, having, by the terms of a convention signed at Washington on the 26th of February, 1851, asked us to pronounce as arbiter upon a claim relative to the American privateer "General Armstrong," which was destroyed in the port of Fayal on the 27th of September, 1814; after having caused ourself to be correctly and circumstantially informed in regard to the facts which have been the cause of the difference, and after having maturely examined the documents duly signed in the name of the two parties, which have been submitted to our inspection by the representatives of both powers, considering that it is clear, in fact, that the United States were at war with her

Britannic majesty, and her most faithful majesty preserving her neutrality, the American brig, the "General Armstrong," commanded by Captain Reid, legally provided with letters of marque, and armed for privateering purposes, having sailed from the port of New York, did, on the 26th of September, 1814, cast anchor in the port of Fayal, one of the Azores Islands, constituting part of her most faithful majesty's dominions;

That it is equally clear that, on the evening of the same day, an English squadron, commanded by Commodore Lloyd, entered the same port;

That it is no less certain that during the following night, regardless of the rights of sovereignty and neutrality of her most faithful majesty, a bloody encounter took place between the Americans and the English; and that, on the following day, the 27th of September, one of the vessels belonging to the English squadron came to range herself near the American privateer for the purpose of cannonading her; that this demonstration, accompanied by the act, determined Captain Reid, followed by his crew, to abandon his vessel, and to destroy her;

Considering that if it be clear that, on the night of the 26th of September, some English long-boats, commanded by Lieutenant Robert Fausset, of the British navy, approached the American brig, the "General Armstrong," it is not certain that the men who manned the boats aforesaid were provided with arms and ammunition;

That it is evident, in fact, from the documents which have been exhibited, that the aforesaid long-boats, having approached the American brig, the crew of the latter, after having hailed them and summoned them to be off, immediately fired upon them, and that some men were killed on board the English boats, and others wounded—some of whom mortally—without any attempt having been made on the part of the crew of the boats to repel at once force by force;

Considering that the report of the Governor of Fayal proves that the American captain did not apply to the Portuguese government for protection until blood had already been shed, and, when the fire had ceased, the brig "General Armstrong" came to anchor under the castle at a distance of a stone throw; that said governor states, that it was only then, that he was informed of what was passing in the port; that he did, on several occasions, interpose with Commodore Lloyd, with a view

of obtaining a cessation of hostilities, and to complain of the violation of a neutral territory;

That he effectively prevented some American sailors, who were on land, from embarking on board the American brig for the purpose of prolonging a conflict which was contrary to the law of nations;

That the weakness of the garrison of the island, and the constant dismantling of the forts, by the removal of the guns which guarded them, rendered all armed intervention on his part impossible;

Considering, in this state of things, that Captain Reid, not having applied from the beginning for the intervention of the neutral sovereign, and having had recourse to arms in order to repel an unjust aggression of which he pretended to be the object, has thus failed to respect the neutrality of the territory of the foreign sovereign, and released that sovereign of the obligation in which he was, to afford him protection by any other means than that of a pacific intervention;

From which it follows that the government of her most faithful majesty cannot be held responsible for the results of the collision which took place in contempt of her rights of sovereignty, in violation of the neutrality of her territory, and without the local officers or lieutenants having been required in proper time, and enabled to grant aid and protection to those having a right to the same;

Therefore, we have decided, and we declare, that the claim presented by the government of the United States against her most faithful majesty has no foundation, and that no indemnity is due by Portugal in consequence of the loss of the American brig, the "General Armstrong," armed for privateering purposes.

Done and signed by duplicate, under the seal of State, at the palace of the Tuileries, on the thirtieth day of the month of November, in the year of grace one thousand eight hundred and fifty-two.

[L. S.] L. NAPOLEON.

LIST OF DOCUMENTS READ IN EVIDENCE.

FIRST SERIES, 1814.

Capt. Reid's Protest, Sen. Doc. 14, 29th Cong. 1st Sess., p. 4.

Letter of John B. Dabney, U. S. consul at Fayal, to the Secretary of State. In Am. State Papers, volume "Naval Affairs," p. 494.

Capt. Reid's letter, *ibid.* 495.

Mr. Dabney to the Governor of the Azores. In Sen. Doc. No. 14, 29th Cong., 1st Sess., p. 16, marked "No. 1."

The Governor of the Azores to the commander of the British forces. "No. 2," *ibid.* p. 17.

The commander of the British squadron to the Governor of the Azores. "No. 3," *ibid.*

The Governor of the Azores to the commander of the British forces "No. 4," p. 18, *ibid.*

Same to the Same. *Ibid.*, "No. 5."

The British consul to the Governor of the Azores, "No. 6," *ibid.*, p. 19.

The Governor of the Azores to Señor Acevedo, the Minister of State of Portugal. *Ibid.*, p. 12.

Mr. Dabney to the Governor of Fayal. P. 4, *ibid.*

The Governor of the Azores to the Minister of State of Portugal. *Ibid*, p. 19.

The Marquis de Aguiar to Mr. Sumpter. *Ibid.*, p. 22.

The Same to Lord Strangford. *Ibid.*, p. 21.

Mr. Sumpter's reply to Marquis de Aguiar. *Ibid.*, p. 7.

SECOND SERIES, 1815 TO 1818.

Mr. Monroe to Mr. Sumpter. *Ibid.*, p. 20. 1815.

Mr. Sumpter to Mr. Monroe. *Ibid.*, p. 23. "

Reports of the Naval Committee of the Senate of the U. S., January, 1817.

Mr. John Quincy Adams to the Chevalier de Serra, 1818. In Ex. Doc. 53, H. of Rep., 32d Congress, 1st Sess., p. 13.

A period of sixteen years here intervenes, and the case is prosecuted from Mr. Monroe's administration, without a knowledge of Portugal's admission, and the proceedings had at Rio Janeiro.

THIRD SERIES, 1834 TO 1854.

Mr. Louis McLane to Capt. Reid. Sen. Doc. 14, p. 23. 1834.

Mr. Dickens to Mr. Kavanagh. *Ibid.*, p. 23. 1835.

Mr. Kavanagh to Mr. Forsyth. Sen. Doc., 14, p. 29. 1836. P. 34, two letters. 1837.

Same to the Same. *Ibid.*, p. 36. 1838.

Same to the Same, grounds of refusal by Portugal. *Ibid.*, p. 30. 1837.

Same to the Same, " " " p. 33. "

Mr. Forsyth to Mr. Reid, continued claim. *Ibid.*, p. 37. 1840.

Mr. Webster to Mr. Barrow, in instructions. *Ibid.*, p. 40. 1842.

" Mr. Reid. *Ibid.*, p. 40. 1842.

Mr. Barrow to Mr. Webster. " p. 41. "

" Duke of Terceira. " p. 41. "

Mr. Webster to Mr. Barrow. " p. 42. "

Fletcher Webster to Mr. Reid. " p. 43. "

Mr. Reid to F. Webster, calls attention to proceedings at Rio. *Ibid.*, p. 43. 1842.

De Castro to Mr. Barrow. *Ibid.*, p. 46.

Mr. Barrow to Mr. Webster. *Ibid.*, p. 47. 1843.

Mr. Barrow to Mr. Upshur. " p. 48. "

De Castro to Mr. Barrow, final answer and refusal of Portugal. *Ibid.* p. 50. 1843.

Mr. Reid to Mr. Upshur, urging a reply to De Castro's letter. *Ibid.*, p. 51.

Mr. Upshur to Mr. Reid, declining to prosecute the claim further. *Ibid.*, p. 54. 1844.

Mr. Reid to Mr. Upshur, urging the government not to abandon the claim. *Ibid.*, p. 54.

Mr. Reid to Mr. Calhoun. *Ibid.*, p. 58.

FOURTH SERIES, 1846 TO 1850.

Report of the Committee on Foreign Relations of the U. S. Senate, made by Mr. Atherton, 19th May, 1846, 1st Sess. 29th Cong.

Letter of instructions from Mr. Clayton to Mr. Hopkins. G, p. 16, Doc. No. 53, 1st Sess. 32d Cong., April, 1849.

Mr. Hopkins to Count Tojal. H, p. 33, *ibid.* (end of the letter), June, 1849.

Mr. Clayton to J. B. Clay. U, p. 68, *ibid.*, March, 1850.

Mr. Clay to Count Tojal, making a peremptory demand. V, p. 69, *ibid.* June, 1850.

Count Tojal to Mr. Clay. Y, p. 73, Ho. Doc., No. 53, proposing to pay all the other claims, and arbitrate this case. July, 1850.

Letters showing proof of bonus in consideration of agreement to arbitrate:

Mr. Clay to Count Tojal. Z, p. 77, *ibid.* July, 1850.
Count Tojal to Mr. Clay. A A, p. 79, *ibid.* July, 1850.
Mr. Clay to Count Tojal. B B, p. 80, *ibid.* July, 1850.
Mr Webster to De Figanière, B B B, p. 112, *ibid.* Sept., 1850.

Letters admitting England's acknowledgments:

Count Tojal to Mr. Hopkins. I, p. 33. Sept. 1849.
Count Tojal to Mr. Clay. L, p. 51, *ibid.* March, 1850.
Mr. Clay to Count Tojal. M, p. 54, *ibid.* March, 1850.
That Portugal never abandoned this claim against England. H, p. 31, *ibid.* June, 1849.

Demand of correspondence between Portugal and England:

Mr. Clay to Count Tojal. K, p. 46, *ibid*, Nov. 1849.

Interference of England in this negotiation:

Count Tojal to Mr. Clay. N., p. 57, *ibid.* April, 1850.
Same to the same. P., p. 62, *ibid.* May, 1850.

Determination of the President not to arbitrate this claim:

Mr. Clayton to Mr. Clay. U, p. 68. March, 1850.
Mr. Clayton to De Figanière. T T, p. 97. April, 1850.
Same to Same. V V, p. 99. May, 1850.
Same to Same. No. 22, p. 180. May, 1850.
Same to Same, No. 25, p. 186. June, 1850.
Mr. De Figanière to Mr. Webster, Z Z, p. 110. Aug., 1850.
Mr. Clayton to Mr. Reid. [Private F.] June, 1852.

FIFTH SERIES, 1850 TO 1854.

The action of Mr. Webster, who agreed to submit the claim to arbitration, three days after he became Secretary of State. See Mr, Clayton's Speeches, p. 5, 13, and 17.

Mr. Webster to Mr. Clay. D D, p. 83. Aug. 1850.
Mr. Webster to De Figanière. B B B, p. 112. Sept., 1850.

Captain Reid to Mr. Webster. In Senate Speeches, p. 9. Aug. 26th 1850.

Mr. Webster to Capt. Reid. Aug. 29th, 1850. In Sen. Speeches, p. 7

Mr. Reid to Mr. Webster. Sept. 5, 1850. *Ibid.*

Mr. Webster to Mr. Reid. Sept. 13th, 1850. *Ibid.*

Mr. Webster to Mr. Hadduck. F F, p. 84. Ho. Doc., No. 53. Feb., 1851.

Same to Same. G G, *ibid.* March, 1851.

Convention between the United States and Portugal.

Copy of draft of Protocol. June 9, 1851. [No. 1.]

Letter of Mr. J. A. Thomas to Mr. Phillips. [No. 2.]

That the proof of claimants' demand was limited to the correspondence, subsequent to that of 1814.

Mr. Webster to Mr. Hadduck. H H, p. 85. Ho. Doc. No. 53. March, 1851.

Same to Same. K K, p. 86. *Ibid.* July, 1851.

Mr. Hadduck to Mr. Webster. L L. *Ibid.* July, 1851.

Argument of claimants refused to be submitted by the Department of State to the arbiter. [See Memorial Sen. Mis. Doc. 14, 1 Sess. 33 Cong.]

Mr. Reid to Mr. Webster. July 7th, 1851. [Marked B.]

Same to Same. Aug 1, 1851. [Marked C.]

Mr. Crittenden to Mr. Reid. Sept. 29th, 1851. [Marked D.]

Mr. Rives to Mr. Everett, enclosing the award of Louis Napoleon. Paris, Dec. 13, 1852. Ex. Doc. of Sen. No. 24, 2 Sess., 32 Cong.

Mr. Reid to Mr. Everett, Jan. 8th, 1853, protesting against the award of Louis Napoleon. [No. 3.]

Mr. Everett, Secretary of State, to Mr. Reid. [Marked E.]

Letter of Charles W. Dabney, U. S. consul at Fayal, to Wm. L. Marcy, Secretary of State, May 21st, 1853, proving the fact that the English were the first aggressors. [No. 4.]

Letter of Mr. Marcy to the President, December 10th, 1853, declaring the award to be final as to the liability of Portugal. See Sen. Ex. Doc. No. 7, 1 Sess. 33 Cong.

The unanimous report of the Committee on Foreign Relations of the Senate, by Hon. John Slidell. March 10th, 1854. No. 157, 1 Sess. of 33 Cong.

The unanimous report on Foreign Affairs of the House, by Hon. John Perkins, Jr. May 29th, 1854. No. 139. 1 Sess. of 33 Cong.